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Reining in the “Third Path”: Rethinking the War Powers Resolution and Private Security Contractors

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Reining in the “Third Path”: Rethinking the War Powers Resolution and Private Security Contractors

Brian T. Warren*

Abstract

From the American Revolution to the War in Afghanistan, the United States has hired private contractors to perform a myriad of tasks, from feeding the troops to researching hypersonic missile defense systems. Following the collapse of the Soviet Union, however, the nature of work performed by these contractors began to shift. No longer were contractors relegated solely to unarmed tasks. From the jungles of Colombia to the deserts of Iraq, armed contractors—known as Private Security Contractors (PSCs)—have guarded American military bases, protected heads of state, assaulted enemy compounds, and more.

Using PSCs is not without risk. Incidents like the Nisour Square massacre highlight the devastation that PSCs can cause. While advocates point to a seemingly robust web of legal

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restraints that constrain the worst excesses of PSC abuse, this Note argues that these checks are ultimately inadequate. Moreover, PSCs escape one of the strongest protections that would limit their use: the War Powers Resolution. The War Powers Resolution is a pioneering piece of legislation meant to constrain the unfettered zeal of executive authority. However, because the Resolution applies only to the “U.S. Armed Forces,” and not PSCs, the President may deploy PSCs for long periods of time without meaningful congressional oversight.

This Note proposes that Congress should expand the War Powers Resolution to incorporate PSCs by explicitly adding the phrase “Private Security Contractors” to the statute. By including PSCs, Congress will have more legislative tools to monitor and potentially restrict the President’s use of PSCs. Requiring the President to consult, report, and notify Congress when deploying PSCs allows Congress to exert pressure on the President to avoid any unwarranted use and prevent potential future catastrophe.

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INTRODUCTION

The War in Afghanistan was the longest war in American history.¹ A baby born on September 11, 2001, could still have enlisted and fought in Afghanistan before the war ended.² This protracted conflict consumed over \$2 trillion dollars, amounting to “\$300 million dollars per day, every day, for two decades.”³ The cost in human lives is staggering: 2,448 U.S. service members were killed, 3,846 private contractors were killed, 66,000 Afghan national military and police were killed, and 47,245 Afghan civilians were killed.⁴ Approximately half of the Afghan population⁵ and two-fifths of U.S. veterans who were deployed to Afghanistan suffer from mental health conditions like depression, anxiety, and post-trauma stress disorder.⁶

Concerned that then-President Donald Trump would continue the conflict that had already stretched across four presidential terms, White House advisors Steven Bannon and Jared Kushner sought advice from two private security contractor (“PSC”) giants—Erik Prince, a founder of the private security company Blackwater Worldwide, and Stephen

1. Griff Witte, *Afghanistan War*, ENCYC. BRITANNICA (June 7, 2010), <https://perma.cc/3TEF-NMVR> (last updated Aug. 16, 2021).

2. Alex Horton, *The Afghanistan War Has Gone on So Long that People Born After 9/11 Can Now Enlist*, WASH. POST (Sept. 12, 2018, 6:00 AM), <https://perma.cc/MP4R-6G8U>.

3. Christopher Helman & Hank Tucker, *The War in Afghanistan Cost America \$300 Million per Day for 20 Years, with Big Bills Yet to Come*, FORBES (Aug. 16, 2021, 3:05 PM), <https://perma.cc/9FPU-3NGV>.

4. Ellen Knickmeyer, *Costs of the Afghanistan War, in Lives and Dollars*, AP NEWS (Aug. 17, 2021), <https://perma.cc/R46D-PVCX>.

5. Jonathan Pedneault, *Afghanistan’s Silent Mental Health Crisis*, HUM. RTS. WATCH (Oct. 7, 2019, 7:17 AM), <https://perma.cc/U94K-PV8W>.

6. Michael Hudson, *As Our Nation Seeks to Leave the War in Afghanistan Behind, Let’s Not Forget Our Troops’ Sacrifice*, MIL. TIMES (May 4, 2021), <https://perma.cc/ZBH5-EE5D>.

Feinberg, owner of DynCorp International.⁷ Instead of proposing a plan that would maintain or withdraw U.S. military presence, Prince proposed a “third path.”⁸ His proposal would largely replace U.S. Armed Forces with PSCs performing nearly the same tasks as uniformed service members but wearing private uniforms instead of public ones.⁹ This plan called for a blend of U.S. Special Operations personnel and PSCs to strengthen Afghanistan’s security forces while simultaneously engaging in combat operations to weaken the Taliban and Al Qaeda’s capabilities.¹⁰ A single person, dubbed “viceroy,” would have authority over “all U.S. government and coalition efforts—including command, budget, policy, promotion and contracting—and [who] report[s] directly to the president.”¹¹

Although Trump’s closest advisors floated this proposal to the President, it was never under serious consideration.¹² Despite the plan’s shock value, it was not as far-fetched as it sounds. The U.S. government has always, to varying degrees, relied on private contractors to accomplish policy objectives.¹³ Contractors helped supply the Continental Army, developed the Higgins boat that helped the Allies win World War II, and delivered essential food and ammunition to uniformed soldiers

7. Mark Landler et al., *Trump Aides Recruited Businessmen to Devise Options for Afghanistan*, N.Y. TIMES (July 17, 2017), <https://perma.cc/Z6NR-VU4Z>.

8. Erik Prince, *Erik Prince: Contractors, Not Troops, Will Save Afghanistan*, N.Y. TIMES (Aug. 30, 2017), <https://perma.cc/QR3D-W94M>.

9. *See id.* (“Just as no one criticizes Elon Musk because his company SpaceX helps supply American astronauts, no one should criticize a private company—mine or anyone else’s—for helping us end this ugly multigenerational war.”).

10. Eric Prince, *The MacArthur Model for Afghanistan*, WALL ST. J. (May 31, 2017, 6:17 PM), <https://perma.cc/8R8S-TZDR>.

11. *Id.*

12. *See* Carol E. Lee et al., *Officials Worry Trump May Back Erik Prince Plan to Privatize War in Afghanistan*, NBC (Aug. 17, 2018, 11:59 AM), <https://perma.cc/QF2M-CLJH> (last updated Aug. 17, 2018, 1:12 PM) (reporting that a spokesperson for the National Security Council said “[n]o such proposal from Erik Prince is under consideration”).

13. *See infra* Part I.

in Vietnam.¹⁴ Only within the past three decades has there been a shift towards the use of armed contractors.¹⁵

This transition has ushered in a paradigm shift for the U.S. military.¹⁶ During the Iraq troop surge of 2007—the height of the Iraq war—there were more contractors than active service members in Iraq.¹⁷ Many of these contractors were PSCs.¹⁸ PSCs guarded American embassies in Iraq, protected high-ranking officials like then-President of Afghanistan Hamid Karzai, secured safe travel for convoys in Afghanistan, and more.¹⁹ They offer the executive branch a host of advantages, namely a way for the President to accomplish foreign policy objectives without much congressional intervention.²⁰

Although PSCs perform nearly the same services as the U.S. Armed Forces, they are not subject to the same rules—notably the War Powers Resolution of 1973 (“War Powers Resolution”).²¹ Congress passed the War Powers Resolution to restrain the President from unilaterally introducing U.S. troops into hostilities without congressional input.²² By including both political branches of the government, Congress sought to prevent the United States from entering conflicts that harm its strategic interests or

14. See *infra* Part I.A.

15. See *infra* Part I.B.

16. See DEBORAH C. KIDWELL, COMBAT STUD. INST., PUBLIC WAR, PRIVATE FIGHT? THE UNITED STATES AND PRIVATE MILITARY COMPANIES 3 (2011) (“Logistician Joe Fortner observes, ‘contractors are not replacing force structure, they are becoming force structure.’”).

17. The number of Department of Defense (DOD) contractors in Iraq in 2007 numbered close to 200,000 people. Deborah Avant & Lee Sigelman, *Private Security and Democracy: Lessons from the US in Iraq*, 19 SEC. STUD. 230, 233 (2010). Similarly, the number of contractors in Afghanistan during the Obama administration exceeded the number of U.S. service members, hovering around 74,000. *Id.*

18. *Id.* at 231.

19. Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1013 (2004).

20. See *infra* Part II.B.

21. War Powers Resolution of 1973, Pub. L. No. 93-148, § 2(a), 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541–1548).

22. 50 U.S.C. § 1542.

domestic security.²³ To this day, the War Powers Resolution “remains the key statutory framework for regulating the relationship between the political branches with respect to the use of U.S. Armed Forces abroad.”²⁴ Despite these aspirations, the War Powers Resolution only applies to U.S. Armed Forces, not PSCs.²⁵

This statutory gap—not contemplated by Congress in 1973 when the War Powers Resolution was passed²⁶—leaves open the possibility that the President could deploy PSCs without much congressional oversight.²⁷ Congress, of course, has constitutional and statutory powers—like its appropriations powers—to limit the President from doing this.²⁸ But, for a host of reasons discussed later in this Note, such powers are insufficient to adequately check the President’s ability to deploy PSCs overseas.²⁹

While there has yet to be a conflict where uniformed service members have been completely replaced by PSCs, this possibility is a concern shared by many commentators.³⁰ The growing dependence on PSCs, the emergence of new conflicts, and traditional political pressures may cause a future

23. See Robert Bejesky, *Dubitable Security Threats and Low Intensity Interventions as the Achilles’ Heel of War Powers*, 32 MISS. COLL. L. REV. 9, 66 (2013) (recognizing that Congress enacted the War Powers Act in response to the failures of the Vietnam War).

24. TESS BRIDGEMAN, REISS CTR. ON L. & SEC., WAR POWERS RESOLUTION REPORTING: PRESIDENTIAL PRACTICE AND THE USE OF ARMED FORCES ABROAD, 1973–2019, 10 (2020), <https://perma.cc/7BZA-DZN9> (PDF).

25. See Michaels, *supra* note 19, at 1076.

26. A review of the legislative history does not reveal any references to private security contractors. The closest reference was a proposed amendment by former Missouri Senator Thomas Eagleton. See Louis Fisher, *Basic Principles of the War Power*, 5 J. NAT’L SEC. L. & POL’Y 319, 336 (2012). He proposed an amendment to the War Powers Resolution that would cover the conduct of “civilian combatants engaged in paramilitary operations supervised by the Central Intelligence Agency.” *Id.* This amendment was left out of the final bill. *Id.*

27. See *infra* Part II.A.

28. U.S. CONST. art. I, § 9, cl. 7.

29. See *infra* Part II.A.

30. See *e.g.*, Michaels, *supra* note 19, at 1049 (examining the risks posed by the President when he seeks to deploy “private troops instead of U.S. soldiers”); SEAN MCFATE, *MERCENARIES AND WAR: UNDERSTANDING PRIVATE ARMIES TODAY* 23 (2019) [hereinafter MCFATE, *MERCENARIES AND WAR*] (“Contracting is now part of the American way of war.”).

President to rely on PSCs in a manner similar to Erik Prince’s plan.³¹ Because PSCs perform nearly the same tasks as uniformed service members while not being subject to the same checks, this Note proposes that the phrase “Private Security Contractors” be explicitly incorporated into the War Powers Resolution.³² Including PSCs in the War Powers Resolution will provide Congress more statutory tools to regulate the President’s use of PSCs, potentially averting future catastrophes.³³

This Note explores the implications of incorporating PSCs under the War Powers Resolution. Part I traces the growth of the PSC industry from the American Revolution to the War in Afghanistan. Part II discusses how current attempts to regulate PSCs fail, and why, because of these failures, the President may wish to sidestep traditional congressional checks on the military. Part III recommends incorporating PSCs into the War Powers Resolution, considering the risks posed by their unrestrained use. This Note concludes that, given the current dependence on PSCs and the harms caused by their unconstrained use, Congress should amend the War Powers Resolution to include PSCs.

I. THE AMERICAN PRIVATE MILITARY INDUSTRY

Broadly, a defense contractor is a private person or corporation that contracts with the Department of Defense (DOD) to provide goods or services.³⁴ Quintessential defense

31. See Michaels, *supra* note 19, at 1008

[R]esorting to private contractors, dispatched to serve American interests without carrying the . . . legal imprimatur of the United States, may be quite tempting. In those instances . . . it might be the status of the actors (as private, non-governmental agents) . . . that entices policymakers to turn to contracting . . . to achieve public policy ends that would not otherwise be attainable, were the government confined to relying exclusively on members of the U.S. Armed Forces.

32. See *infra* Part III.B.

33. See *infra* Part III.B.

34. See 32 C.F.R. § 158.3 (2023) (defining “defense contractor” as “any individual, firm, corporation, partnership, association, or other legal non-Federal entity that enters into a contract directly with the DOD to furnish services, supplies, or construction”).

contractors include Lockheed Martin, Boeing, and Raytheon.³⁵ Relative newcomers like DynCorp, Triple Canopy, and Academi³⁶ are increasingly gaining reputations as essential defense contractors.³⁷ Instead of developing and supplying innovative fighter jets, tanks, and anti-aircraft systems, like the older quintessential defense contractors, these new companies primarily supply soldiers.³⁸

Known as private security contractors, these companies are a subset of defense contractors.³⁹ These companies employ military professionals—former generals, special operations soldiers, intelligence specialists, and more⁴⁰—in addition to owning and operating armed helicopters,⁴¹ fighter jets,⁴² and other armaments. PSCs are part of the broader private military industry⁴³ and provide a variety of armed services.⁴⁴

35. *See id.*

36. Academi was originally founded as Blackwater but after the 2007 Nisour Square massacre it changed its name to Xe Services and then changed again to Academi in 2011. Jason Ukman, *Ex-Blackwater Firm Gets a Name Change, Again*, WASH. POST (Dec. 12, 2011), <https://perma.cc/RZ3L-7S9L>.

37. *See* JENNIFER K. ELSEA ET AL., CONG. RSCH. SERV., RL32419, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES 7 (2008).

38. *Id.* These companies provide other services, including intelligence analysis, operational coordination, and security training, but this Note focuses on services that require armed security. *Id.*

39. *See* MOSHE SCHWARTZ, CONG. RSCH. SERV., R40835, THE DEPARTMENT OF DEFENSE'S USE OF PRIVATE SECURITY CONTRACTORS IN AFGHANISTAN AND IRAQ: BACKGROUND, ANALYSIS, AND OPTIONS FOR CONGRESS 1 (2011).

40. *See* Michaels, *supra* note 19, at 1022–23.

41. *See e.g.* *Warplanes: Blackwater Buys Brazilian Bombers*, STRATEGY PAGE (Aug. 27, 2007), <https://perma.cc/Z2Y4-LQD4>.

42. *See* Valius Venckunas, *World's Most Powerful Private Air Forces*, AEROTIME HUB (Sept. 26, 2020), <https://perma.cc/B6L9-VE2J>.

43. The private military industry is made up of “corporate bodies that specialize in the provision of military skills, including tactical combat operations, strategic planning, intelligence gathering and analysis, operational support, troop training, and military technical assistance.” Peter Singer, *Corporate Warriors: The Rise of the Privatized Military Industry and Its Ramifications for International Security*, 26 INT’L SEC. 186, 186 (2001). Because the terminology across this field is not uniform, it is difficult to compare data and statements about the private military industry. Peter Singer, a prominent private military firm scholar, divided the industry in three parts: (i) military provider firms that specialize in providing armed security; (ii) military consulting firms that focus on advising and training

These services include guarding government buildings, escorting high-ranking officials traveling in dangerous areas, securing safe travel for delivery vehicles, and more.⁴⁵

This ever-expanding, multibillion-dollar industry did not spring out of thin air.⁴⁶ Rather, defense contractors have their roots embedded in the founding of this nation, or, as one commentator put it, “Private contractors are as American as apple pie.”⁴⁷

A. *The Advent of PSCs*

Far before the infamous days of Blackwater,⁴⁸ defense contractors were first used not in the conquest of a prized territory or in the defense of some distant island, but to supply George Washington’s Continental Army.⁴⁹ The rationale for using these defense contractors rested on the belief that they would be cheaper and more effective than their public counterparts—a hope that did not materialize.⁵⁰ Nevertheless, the United States used defense contractors for decades

armed forces; and (iii) military support firms that provide logistical and technical support. *Id.* at 200–03. Other academic commentators use the term “Private Military and Security Companies” to denote private military contractors that “perform services that might otherwise be provided by military forces.” Avant & Sigelman, *supra* note 17, at 232 n.8.

44. PSCs are often, but not always, defined by the services they provide—in this case, armed services. SCHWARTZ, *supra* note 39, at 1–2.

45. *Id.* at 2.

46. *See infra* Part I.A.

47. David Isenberg, *The Founding Contractors*, CATO INST. (July 7, 2008), <https://perma.cc/WK2R-MYCZ>.

48. For a robust discussion on the Nisour Square Massacre, perpetrated by Blackwater PSCs, see Katia Snukal & Emily Gilbert, *War, Law, Jurisdiction, and Juridical Othering: Private Military Security Contractors and the Nisour Square Massacre*, 33 SOC’Y & SPACE 660 (2015).

49. *See* ERNA RISCH, SUPPLYING WASHINGTON’S ARMY 61 (1986), <https://perma.cc/X59F-VBYR> (PDF).

50. *See id.* at 256

Morris had believed that competition among private contractors would result in advantageous terms for the government. Instead, the principal contractors . . . had entered into private and subordinate agreements with each other, thereby seriously impairing the competition that Morris had counted on to act as a check on profits. The contract system was not working as he had hoped.

following the Revolutionary War to provide supplementary logistical support for the military.⁵¹ For example, during the Mexican-American War, defense contractors supplied American expeditionary forces with goods and services “better than ever before in the nation’s history.”⁵² This support would continue through World War I.⁵³ It was not until World War II that the military began to rely on defense contractors for more than logistical support.⁵⁴

The protracted and global nature of World War II resulted in a shortage of military personnel to perform tasks like transportation, maintenance, and labor.⁵⁵ Defense contractors filled the gap.⁵⁶ Over the course of the war, private construction firms completed an estimated \$7.2 billion in projects, compared to the Army Corps of Engineers’ \$1.8 billion.⁵⁷ For example, the U.S. Navy awarded Higgins Industries a contract to build Higgins landing crafts for the military, a vehicle that Eisenhower proudly observed “won the war for [the Allies].”⁵⁸ Over the next few decades, the military grew to rely on defense contractors for logistical support and other garden-variety tasks such as engineering and construction.⁵⁹ Still, the military did not use defense contractors to provide security services.⁶⁰

51. See KIDWELL, *supra* note 16, at 9–22 (noting that waste and abuse continued to pervade defense contracts resulting in officials learning and “relearn[ing] contractual pitfalls”). In fact, the meaning of the word “shoddy” as we know it today stems from poor contracting performance. *Id.* at 12. This highlights the wide range of quality amongst contractors—some who provide terrible service and others who provide stellar performance.

52. *Id.*

53. *Id.* at 12–13.

54. *Id.*

55. See *id.* at 13.

56. *Id.* at 14.

57. *Id.* This disparity could conceivably be chalked up to cost overruns—although the majority of defense contracts were paid on a fixed fee basis. *Id.* Regardless, this comparison illustrates the growing importance of defense contractors to the military.

58. *The Patented Boat That Won the War*, U.S. PATENT & TRADEMARK OFF., <https://perma.cc/7T4A-CFW3> (“By 1943, an astounding nine out of 10 vessels in the U.S. Navy were designed by Higgins Industries.”).

59. See KIDWELL, *supra* note 16, at 15–16. In Vietnam, “contractors and civilian workmen for the first time in history assumed a major construction

This distinction would not last. The fall of the Soviet Union represented a sea change for defense contractors.⁶¹ This dramatic change in power prompted the United States to significantly downsize both its military and civilian workforces.⁶² As part of the "peace dividend," the United States no longer needed a large standing army.⁶³ The West had achieved victory, and "history had ended."⁶⁴ Or so it seemed. While Francis Fukuyama was incorrect in his prediction that "history had ended,"⁶⁵ he was correct that "terrorism and wars of national liberalism will continue."⁶⁶

Even though the Soviet Union had dissolved, national security threats had not subsided.⁶⁷ To the contrary, security threats transitioned away from a state-centric focus and instead morphed into transnational threats involving organized crime, terrorist groups, and civil wars.⁶⁸ To deal with the changing environment, the United States increased its

role in an active theater of operations." *Id.* at 16 (quoting Lieutenant General Carroll H. Dunn).

60. *Id.* at 16.

61. See Singer, *supra* note 43, at 188 ("Since the end of the Cold War, [private military firm] activity has surged . . ."); see also Michaels, *supra* note 19, at 1012–18 (describing the changes of 1990s as a "privatization revolution").

62. See Rebecca R. Vernon, *Battlefield Contractors: Facing the Tough Issues*, 33 PUB. CONT. L.J. 369, 375 (2004) ("By 1995, the active duty and reserve components were reduced by 25 percent, cutting a total of 861,000 personnel.").

63. Peace dividend is the concept that once a conflict concludes, the decrease in military spending (e.g., downsizing the military) spurs economic growth because military spending is redirected to social programs or overall taxes are reduced. See generally Michael D. Ward & David R. Davis, *Sizing Up the Peace Dividend: Economic Growth and Military Spending in the United States, 1948–1996*, 86 AM. POL. SCI. REV. 748 (1992).

64. Francis Fukuyama, *The End of History*, 16 NAT'L INT. 3, 12 (1989).

65. See Timothy Stanley & Alexander Lee, *It's Still Not the End of History*, THE ATLANTIC (Sept. 1, 2014), <https://perma.cc/5FHH-KKBP> ("History isn't over and neither liberalism nor democracy is ascendant.").

66. Fukuyama, *supra* note 64, at 18.

67. See Singer, *supra* note 43, at 193 ("[A] raft of new security threats began to appear after 1989, many involving emerging ethnic or internal conflicts.").

68. For further discussion of the post-Cold War security situation, see Michael D. Intriligator, *Global Security After the End of the Cold War*, 13 CONFLICT MGMT. & PEACE SCI. 101 (1994).

peacekeeping and humanitarian missions.⁶⁹ With fewer overall troops, defense contractors were needed to deal with post-Cold War challenges.⁷⁰ As a result, defense contractors joined U.S. uniformed personnel in practically every major U.S. military operation of the 1990s: the Persian Gulf, Somalia, Haiti, Zaire, Bosnia, and Kosovo.⁷¹ This growing dependence led many analysts to conclude that the U.S. military could not function without defense contractors.⁷²

The decision to outsource government functions facilitated this dependence.⁷³ OMB Circular A-76, a policy statement issued by the Eisenhower Administration's Bureau of the Budget (later renamed the Office of Management and Budget), urged federal agencies to outsource goods and services if such goods and services could be procured from the private sector.⁷⁴ While at the time the directive was non-binding—but would later become binding in 1998 via the Federal Activities Inventory Reform (FAIR) Act⁷⁵—it influenced the Army, and later the DOD, to issue similar directives.⁷⁶ In the 1990s, the DOD decided to formally incorporate defense contractors into its “force structure.”⁷⁷ By doing so, the DOD “institutionalized”

69. See Vernon, *supra* note 62, at 374–76.

70. Singer, *supra* note 43, at 188.

71. *Id.*

72. Deborah Avant, a leading private military firm scholar, said in the early 2000s that “[t]he Army couldn’t go to war without [defense contractors].” Renae Merle, *More Civilians Accompanying U.S. Military*, WASH. POST (Jan. 22, 2003), <https://perma.cc/9NF7-E3YW>. Similarly, Loren B. Thompson, chief operating officer of the Lexington Institute, said, “The military is now so dependent on the private sector for logistics and support, I am not sure it could function without contractors.” *Id.*

73. See Vernon, *supra* note 62, at 376.

74. CONG. RSCH. SERV., IF10566, A-76 COMPETITIONS IN THE DEPARTMENT OF DEFENSE 1 (2020).

75. Vernon, *supra* note 62, at 376.

76. See SARAH K. COTTON ET AL., HIRED GUNS: VIEWS ABOUT ARMED CONTRACTORS IN OPERATION IRAQI FREEDOM 10 (2010).

77. See Department of Defense, Instruction No. 3020.37, 1990, p. 2

It is DOD policy that: 4.1. The DOD Components shall rely on the most effective mix of the Total Force, cost and other factors considered, including Active, Reserve, civilian, host-nation, *and contract resources* necessary to fulfill assigned peacetime and wartime missions. 4.2. *Contractors* providing services designated as essential by a DOD Component are expected to use all means at

its relationship with defense contractors.⁷⁸ In essence, the DOD recognized that contracting with defense contractors was no longer optional; rather, it was *necessary* for the military to function.⁷⁹ By cutting down on its uniformed personnel and directing the military to outsource, the United States set the stage for creating the modern private security industry.⁸⁰

The downsizing of military and civilian personnel, the integration of defense contractors into the DOD’s force structure, and the emergence of new security threats produced a perfect storm that expanded the types of services defense contractors provided.⁸¹ Defense contractors were no longer limited to providing goods and non-combat services.⁸² Instead, defense contractors were now performing a host of combat-related services⁸³—services traditionally thought to be “inherently governmental” in nature.⁸⁴ For example, in the Balkans, PSCs replaced Army soldiers guarding military

their disposal to continue to provide such services, in accordance with the terms and conditions of the contract during periods of crisis, until appropriately released or evacuated by military authority. (emphasis added).

“Force structure” is defined as the components that comprise the DOD, both military and civilian. *Force Structure*, DEFINITION, <https://perma.cc/U88X-AT28>.

78. COTTON ET AL., *supra* note 76, at 10.

79. *See supra* note 72 and accompanying text.

80. *See* MCFATE, *MERCENARIES AND WAR*, *supra* note 30, at 18.

81. *See* Michaels, *supra* note 19, at 1020–24.

82. *Id.* Other new roles for defense contractors included gathering intelligence and training foreign militaries. *Id.* at 1019. Analyzing these activities is beyond the scope of this Note. Intelligence services often blend with covert operations, an area separated from military activity by differing statutes, regulations, and policies. MICHAEL E. DEVINE, CONG. RSCH. SERV., R45175, *COVERT ACTION AND CLANDESTINE ACTIVITIES OF THE INTELLIGENCE COMMUNITY: SELECTED DEFINITIONS IN BRIEF ii* (2019). The President is required to report covert operations only to congressional intelligence committees. 50 U.S.C. § 3093. Training services are explicitly excluded from the War Powers Resolution, and the procurement process is handled by the State Department. *See* 50 U.S.C. § 1543; Michaels, *supra* note 19, at 1026–29 (describing the State Department’s Foreign Military Sales program, which licenses the services of American defense contractors to foreign countries).

83. *See* Michaels, *supra* note 19, at 1019.

84. *See infra* Part II.A.

installations.⁸⁵ More dramatically, in Colombia, PSCs were used as part of the War on Drugs.⁸⁶ Despite these two examples, the U.S. military's dependence on PSCs would greatly change during the Iraq and Afghanistan Wars.⁸⁷ These conflicts would alter the quantity and quality of services provided by PSCs compared to previous forays in the Balkans and Colombia.⁸⁸

The transition to providing armed services was difficult to say the least. In Afghanistan, DynCorp was contracted out to protect then-President of Afghanistan Hamid Karzai.⁸⁹ A State Department Office of Inspector General audit of DynCorp's contract found erroneous billing practices and understaffed protective details.⁹⁰ Other PSCs were running protection rackets on essentially the *entire* U.S. supply chain.⁹¹ Inadequate oversight and accountability of PSCs plagued their presence in Afghanistan.⁹²

85. JENNIFER K. ELSEA ET AL., CONG. RSCH. SERV., R41989, CONGRESSIONAL AUTHORITY TO LIMIT MILITARY OPERATIONS 1 (2013) [hereinafter ELSEA ET AL., CONGRESSIONAL AUTHORITY].

86. See Michaels, *supra* note 19, at 1025 (noting that DynCorp would be “drawn into firefights with narco-traffickers and . . . leftist rebels”).

87. See COTTON ET AL., *supra* note 76, at 11 (“Before the 2003 invasion of Iraq, *armed* contractors had rarely been used in a war zone.” (emphasis in original)).

88. See Michaels, *supra* note 19, at 1020.

89. *Id.* at 1029–30 (“Defense Secretary Rumsfeld insisted that privatization was a necessity: He simply could not spare the handful of troops any longer.”).

90. U.S. DEP'T OF STATE, REVIEW OF ALLEGATIONS CONCERNING DYNCORP INTERNATIONAL'S WORLDWIDE PERSONAL PROTECTIVE SERVICES CONTRACT IN AFGHANISTAN, REPORT OF AUDIT 1 (2004), <https://perma.cc/QF3C-QGLX> (PDF).

91. For a robust discussion on adverse PSC practices in Afghanistan, see MATTHIEU AIKINS, N.Y.U. CTR. ON INT'L COOP., CONTRACTING THE COMMANDERS: TRANSITION AND THE POLITICAL ECONOMY OF AFGHANISTAN'S PRIVATE SECURITY INDUSTRY (2012), <https://perma.cc/6DYC-8P85> (PDF), and JOHN F. TIERNEY, H.R. SUBCOMM. ON NAT'L SEC. AND FOREIGN AFFAIRS, H.R. COMMITTEE ON OVERSIGHT AND GOV'T REFORM, WARLORD, INC., EXTORTION AND CORRUPTION ALONG THE U.S. SUPPLY CHAIN IN AFGHANISTAN (2010) [hereinafter WARLORD, INC.].

92. See WARLORD, INC., *supra* note 91, at 1, 67 (providing recommendations to Congress to improve accountability and oversight).

In Iraq, PSC use was “unprecedented.”⁹³ “The difficulties of the occupation, coupled with the shortages of U.S. troops, an unwillingness to contemplate a military draft, and only minimal assistance from foreign allies” created a security gap that necessitated the use of armed contractors.⁹⁴ PSCs guarded oil fields, protected VIPs, and raided enemy compounds⁹⁵ pursuant to State Department and DOD contracts.⁹⁶ At various times, the total number of defense contractors surpassed the number of uniformed U.S. personnel, with PSCs comprising a relatively small but impactful presence.⁹⁷ For a sense of scope, during the Iraq War, PSCs numbered between 10,000 and 30,000, in comparison to the number of unarmed contractors, which generally stayed above 100,000.⁹⁸ While the number of PSCs might seem small, consider that thousands upon thousands of private individuals, belonging to upwards of 300 firms, were performing armed services for the *first time* in American history.⁹⁹

The economic costs of PSCs are massive. Contractors market themselves as a cost-effective alternative to using public servants, conserving scarce government resources.¹⁰⁰ Former Defense Secretary Donald Rumsfeld and former Vice President Dick Cheney were sold, believing that PSCs would be like “what FedEx did for the Postal Service.”¹⁰¹ Yet this assumption, as it did in 1781,¹⁰² fell flat.

93. COTTON ET AL., *supra* note 76, at 1.

94. Michaels, *supra* note 19, at 1031–32.

95. *See id.* at 1030–34.

96. COTTON ET AL., *supra* note 76, at 12.

97. Avant & Sigelman, *supra* note 17, at 233. There is some concern that PSC presence might be undercounted because the DOD did not begin to gather data on private security contractors until the second half of 2007. *See* SCHWARTZ, *supra* note 39, at 6 (“GAO reported that DOD’s quarterly contractor reports represent only a rough approximation of the number of contractors and therefore should not be relied upon for precise analysis.”).

98. COTTON ET AL., *supra* note 76, at 12.

99. *Id.* at 13.

100. David Isenberg, *Contractors and Cost Effectiveness*, CATO INST. (Dec. 23, 2009), <https://perma.cc/WS2U-76ZE>.

101. Betsy A. Beasley, *The Strange Career of Donald Rumsfeld: Military Logistics and the Routes from Vietnam to Iraq*, 133 RADICAL HIST. REV. 56, 70–71 (2019).

102. RISCH, *supra* note 49, at 61.

Research by economist Dr. Heidi Peltier reveals that “while DOD spending overall rose as a result of the post-9/11 wars, the rise in contracting—in terms of both people and dollars—grew disproportionately.”¹⁰³ In 2019 alone, the DOD spent approximately \$370 billion on its defense contracts, more than 2.5 times the amount it spent in 2001 and slightly more than it currently spends on its uniformed military personnel.¹⁰⁴ This number is admittedly a bit misleading because it encompasses all types of defense contractor services, not just armed services provided by PSCs.¹⁰⁵ Precise data is difficult to come by, likely because the DOD and State department have trouble with oversight and monitoring of PSCs, as Subpart I.B illustrates in greater detail. Rough estimates indicate that a few billion dollars were spent on PSC services between 2003 and 2007.¹⁰⁶ Far from reducing costs, “military contracting is at least as expensive, and often more expensive, than if the military were to perform the same services in-house” because “contractors lack competitive pressures to reduce the prices they charge to the government.”¹⁰⁷ As to the deployment of PSCs, much like in the past, the DOD “acknowledges that there was no comprehensive plan for how to use contractors, and to what extent. As a result, the use of contractors was done on an ad-hoc basis, without significant consideration of implications for foreign policy and without putting in place the necessary oversight.”¹⁰⁸

103. HEIDI PELTIER, THE GROWTH OF THE “CAMO ECONOMY” AND THE COMMERCIALIZATION OF THE POST-9/11 WARS 21 (2020), <https://perma.cc/2FWN-UH6D> (PDF).

104. *Id.* at 4.

105. *Id.* at 5 (clarifying that defense contractors cost a quarter of the total DOD budget, while expenses such as weapon systems procurement, family housing, and military construction account for roughly two-thirds of the budget).

106. COTTON ET AL., *supra* note 76, at 13–14.

107. For a further discussion of the costs associated with military contracting, see PELTIER, *supra* note 103, at 1.

108. MOSHE SCHWARTZ & JENNIFER CHURCH, CONG. RSCH. SERV., R43074, DEPARTMENT OF DEFENSE’S USE OF CONTRACTORS TO SUPPORT MILITARY OPERATIONS: BACKGROUND, ANALYSIS, AND ISSUES FOR CONGRESS 5 (2013).

B. *A Superficial Retrenchment*

During the summer of 2021, the vast majority of PSCs departed Afghanistan before the U.S. formally announced its decision to withdraw U.S. troops from the country.¹⁰⁹ The withdrawal agreement explicitly required the exodus of all PSCs from the country.¹¹⁰ In Iraq, President Joe Biden and then-Prime Minister Mustafa al-Kadhimi made an agreement to end the U.S. combat mission in Iraq by the end of 2021.¹¹¹ Data as of July 2021 reveals that PSC levels have been slowly decreasing, with a little fewer than 2,000 remaining in country.¹¹² It appears that the military is phasing out the use of PSCs, but this assumption is inaccurate.

Shockingly, the federal government does not know where and how PSCs are being used. A Government Accountability Office (GAO) report found that the “DOD cannot readily and comprehensively identify PSC contracts and personnel supporting contingency or other operations.”¹¹³ For example, the GAO was unable to determine whether contractors providing on-site security at Camp Lemonnier in Djibouti were supposed to be officially designated as PSCs or not.¹¹⁴ This is despite the fact that since 2009 the DOD implemented a number of oversight mechanisms—but then failed to monitor

109. See Paul D. Shinkman, *Number of Private Contractors in Afghanistan Drops Precipitously as Biden Pushes Withdrawal Plan*, U.S. NEWS (July 21, 2021), <https://perma.cc/3V87-VF53> (“The number of private military contractors operating in Afghanistan has dropped precipitously in recent months The cuts are especially acute for private security contractors . . .”).

110. CLAYTON THOMAS ET AL., CONG. RSCH. SERV., R46670, U.S. MILITARY DRAWDOWN IN AFGHANISTAN: FREQUENTLY ASKED QUESTIONS (2021).

111. Steve Holland & Trevor Hunnicutt, *Biden, Kadhimi Seal Agreement to End U.S. Combat Mission in Iraq*, REUTERS (July 27, 2021), <https://perma.cc/2YML-EMAF>.

112. CONG. RSCH. SERV., R44116, DEPARTMENT OF DEFENSE CONTRACTOR AND TROOP LEVELS IN AFGHANISTAN AND IRAQ: 2007–2020 9 (2021) (finding that most of the remaining PSCs are foreign nationals).

113. GOV’T ACCOUNTABILITY OFF., GAO-21-255, PRIVATE SECURITY CONTRACTORS: DOD NEEDS TO BETTER IDENTIFY AND MONITOR PERSONNEL AND CONTRACTS 8 (2021).

114. *Id.*

their implementation.¹¹⁵ The GAO observed that if the DOD fails to improve its oversight of PSC contracts, then the “negative strategic impacts the U.S. government experienced in Iraq and Afghanistan are at risk of reoccurring.”¹¹⁶

If the DOD is unaware of where and how PSCs are being used, then it is unclear how the public can be confident that PSCs are *not* being used. One region of interest is Africa. Counterterrorism missions in Africa are rampant; many of them are training missions but a few involve active combat.¹¹⁷ These missions tend to fly “under the radar” because the military and the media do not advertise these activities.¹¹⁸ Yet in 2018, the media reported on a mission that went awry when four U.S. military personnel and five Nigerian soldiers were killed by Islamist militants.¹¹⁹ The DOD reported that the soldiers “had been deployed with a so-called intelligence contractor, a private provider of intelligence information.”¹²⁰ This is consistent with other reports detailing contractor presence in countries like Somalia, where contractors there are operating—but not firing—armed drones.¹²¹

Even without clear evidence of PSCs operating in Africa, there is real concern that PSCs have cemented themselves as inevitable tools of U.S. foreign policy.¹²² Many analysts, including the GAO, believe that “extensive” reliance on PSCs

115. *Id.* at 16; see also THOMAS BRUNEAU, PATRIOTS FOR PROFIT: CONTRACTORS AND THE MILITARY IN U.S. NATIONAL SECURITY 108 (2011) (identifying that rapid PSC growth has “outstripped normal mechanisms of oversight”).

116. GOV'T ACCOUNTABILITY OFF., *supra* note 113, at 30.

117. Stephanie Savell, *This Map Shows Where in the World the U.S. Military Is Combatting Terrorism*, SMITHSONIAN MAG. (Jan. 2019), <https://perma.cc/BQ6Z-R427>.

118. Greg Myre, *The Military Doesn't Advertise It, But U.S. Troops Are All Over Africa*, NPR (Apr. 28, 2018, 7:01 AM), <https://perma.cc/59HW-K9UJ>.

119. *Id.*

120. Bettina Rühl, *Why Private Foreign Security Companies Are Booming in Africa*, DW (Feb. 7, 2021), <https://perma.cc/4RF4-TXQU>.

121. Kira Zalan & Emmanuel Freudenthal, *Private U.S. Contractors Part of the 'Kill Chain' in East Africa Anti-Terrorist Operations*, OCCRP (Aug. 14, 2020), <https://perma.cc/K7A5-T3E5>.

122. GOV'T ACCOUNTABILITY OFF., *supra* note 113, at 30.

will likely continue.¹²³ This is probable for many of the reasons discussed above—that because of pressures like downsizing, the U.S. military will have to rely on PSCs.¹²⁴ This is why regulating PSCs is so important. Unfortunately, current U.S. law contains few, if any constraints, on the use of PSCs. In Part II, this Note assesses the difficulty of constraining the President’s use of PSCs.

II. THE FLAWS IN CURRENT LAWS AND REGULATIONS OVERSEEING PSC CONDUCT

The President, through executive agencies, exercises significant, but not absolute, authority over the use of PSCs.¹²⁵ Through a medley of constitutional powers—the Take Care Clause,¹²⁶ Vesting Clause,¹²⁷ Appointments Clause,¹²⁸ and his near-plenary removal power¹²⁹—the President can drive executive branch policymaking.¹³⁰ Specifically, Cabinet-level positions, like the Secretary of Defense, serve “[s]ubject to the direction of the President.”¹³¹ Since executive agencies handle the procurement process,¹³² the President can drive the agency towards procuring contractors¹³³—although the decision

123. *Id.*; see KIDWELL, *supra* note 16, at 35 (“There’s no turning back [from using contractors].” (quoting Michael P. Peters, former Executive Vice President of the Council on Foreign Relations)).

124. See ELSEA ET AL., CONGRESSIONAL AUTHORITY, *supra* note 85, at 36 (“Without private contractors, the U.S. military would not have sufficient capabilities to carry out an operation of the scale of Iraq.”).

125. For an in-depth discussion on the President’s ability to control federal contractors, see VANESSA K. BURROWS & KATE M. MANUEL, CONG. RSCH. SERV., R41866, PRESIDENTIAL AUTHORITY TO IMPOSE REQUIREMENTS ON FEDERAL CONTRACTORS (2011).

126. U.S. CONST. art. II, § 3.

127. *Id.* art. II, § 2, cl. 1.

128. *Id.* art. II, § 2, cl. 2.

129. See *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203 (2020).

130. See Dennis W. Gleiber & Steven A. Shull, *Presidential Influence in the Policymaking Process*, 45 W. POL. Q. 441, 448 (1992) (“Presidents do seek bureaucratic compliance with their preferences.”).

131. 10 U.S.C. § 113.

132. See ELSEA ET AL., CONGRESSIONAL AUTHORITY, *supra* note 85, at 5.

133. See BURROWS & MANUEL, *supra* note 125, at 3 (“[The Federal Property and Administrative Services Act] authorizes the President to

ultimately falls to the discretion of agency department heads.¹³⁴ The constitutional authority to deploy PSCs is more complex due to the delegation of war powers in the Constitution.

Each political branch indisputably has enumerated war powers.¹³⁵ What is often in dispute is the sharing of those enumerated powers between the political branches and to what extent, if any, Congress or the President has inherent war powers.¹³⁶ One area of heated debate is over the President's authority to initiate the use of force without express congressional authorization.¹³⁷ While scholars¹³⁸ and members of Congress¹³⁹ have challenged the notion that the President has plenary authority over whether to use military forces abroad, the President, in practice, has exercised this authority

prescribe any 'policies and directives' consistent with the act that he 'considers necessary to carry out' the act's goals of efficiency and economy."'). The president's advisors can, and have, influenced the President to hire defense contractors. See Beasley, *supra* note 101, at 70 (discussing Rumsfeld's influence on President Bush).

134. See ELSEA ET AL., CONGRESSIONAL AUTHORITY, *supra* note 85, at 28.

135. Compare U.S. CONST. art. I, § 8, cl. 11 (permitting Congress, among other things, "[t]o declare War" and "grant Letters of Marque and Reprisal"), with U.S. CONST. art. II, § 2, cl. 1 (endowing the President with the role of "Commander in Chief of the Army and Navy").

136. Compare John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 242 (1996) (advocating for inherent executive war powers), with Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 699–702 (1972) (determining that the Framers believed that Congress should "probably" have the dominant role in war-making).

137. See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 699 (2008) (posing the central question of the war powers debate, which is to "[w]hom does the Constitution authorize to commit United States troops to military hostilities").

138. See e.g., Lofgren, *supra* note 136, at 678–81 (explaining that the drafters of the Constitution, especially Alexander Hamilton, were not inclined to give the President the sole authority to make war).

139. See *Dellums v. Bush*, 752 F. Supp. 1141, 1152 (D.D.C. 1990). On eight separate occasions, Congress claimed that the President either needed to comply with the War Powers Resolution or sought to recognize Congress's shared war powers under the Constitution. MICHAEL JOHN GARCIA, CONG. RSCH. SERV., RL30352, WAR POWERS LITIGATION INITIATED BY MEMBERS OF CONGRESS SINCE THE ENACTMENT OF THE WAR POWERS RESOLUTION (2012).

as if he has near-plenary authority.¹⁴⁰ This practice stems from the President’s Commander-in-Chief power,¹⁴¹ which enables him to have “supreme command of the forces in active service.”¹⁴²

This constitutional authority gives the President significant influence to shape the direction of foreign policy.¹⁴³ The President is empowered to authorize the deployment of troops, initiate conflict, and even order the use of nuclear weapons.¹⁴⁴ For example, then-President George W. Bush’s broad directive to initiate a global “war on terror” put the DOD in a situation where it lacked sufficient manpower and had to rely on PSCs to fill its ranks.¹⁴⁵ Granted, Congress authorized these wars,¹⁴⁶ but it was the President who led the foreign policy foray and “opted for contractors.”¹⁴⁷ Because of the President’s substantial control over PSCs, legal constraints ostensibly exist to regulate PSCs.¹⁴⁸ Subpart II.A illustrates why these constraints are inadequate to properly limit the President from wantonly deploying PSCs.

140. See Brendan Flynn, *The War Powers Consultation Act: Keeping War Out of the Zone of Twilight*, 64 CATH. U. L. REV. 1007, 1016 (2015) (stating that the President has deployed U.S. Armed Forces into hostilities a total of 124 times with “something less than a declaration of war, and often with no congressional authorization at all” compared to the five conflicts fought under declaration of war by Congress). *But see* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 467–68 (2012) (“[I]f one’s approach to historical practice focuses on claims of institutional acquiescence, mere recitations of operationally similar past uses of force should not suffice. There should also be some inquiry into Congress’s response.”).

141. U.S. CONST. art. II, § 2, cl. 1.

142. *Commander in Chief Power: Doctrine and Practice*, LEGAL INFO. INST., <https://perma.cc/82BU-ZMH8>.

143. *See id.*

144. *Id.*

145. See Sean McFate, *America’s Addiction to Mercenaries*, THE ATLANTIC (Aug. 12, 2016), <https://perma.cc/6XKP-A3BE> [hereinafter McFate, *America’s Addiction*].

146. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

147. McFate, *America’s Addiction*, *supra* note 145.

148. *See infra* Part I.B.

A. *Existing Legal Constraints Are Ineffective to
Limit the Unbridled Use of PSCs*

A seemingly robust web of legal restraints exists to constrain the executive branch from engaging in “capricious [military] action.”¹⁴⁹ Yet traditional checks that apply to the deployment of U.S. Armed Forces do not apply to PSCs.¹⁵⁰ Ineffective checks on PSCs invite the President to “initiate more conflict than the public might be otherwise willing to support” because there are fewer obstacles in the way of him achieving his foreign policy objectives.¹⁵¹ Ambition left unchecked welcomes wanton executive action because there is no countervailing ambition to check it.¹⁵² As the rest of this Subpart indicates, the web of checks is ineffective at constraining the President’s use of PSCs.¹⁵³

In checking the President’s ambition, Congress’s array of constitutional powers acts as a bulwark against the wanton deployment of military forces.¹⁵⁴ Congress, pursuant to the Appropriations Clause, allocates funds for the military.¹⁵⁵ The power of the purse controls, at least in part, the President’s ability to use military forces by vetoing or influencing his requests to expend resources fighting overseas.¹⁵⁶ Because

149. See Avant & Sigelman, *supra* note 17, at 249.

150. *Id.*

151. Michaels, *supra* note 19, at 1077.

152. See THE FEDERALIST NO. 51 (James Madison) (“Ambition must be made to counteract ambition.”).

153. See Michaels, *supra* note 19, at 1008 (“Military privatization of combat duties . . . has the potential to introduce a range of novel constitutional, democratic, and strategic harms that have few, if any, analogues in the context of domestic, commercial outsourcing.”).

154. *Id.* at 1062.

155. U.S. CONST. art. I, § 9, cl.7. The military is housed under the DOD. 10 U.S.C. § 111.

156. See, e.g., Harold Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1267 (1988) (describing that between 1973 and 1974 alone, “Congress enacted seven separate provisions declaring that no funds authorized or appropriated . . . could be expended to support United States military . . . forces in Vietnam, Cambodia, or Laos”); see also RICHARD F. GRIMMETT, CONG. RSCH. SERV., RS20775, CONGRESSIONAL USE OF FUNDING CUTOFFS SINCE 1970 INVOLVING U.S. MILITARY FORCES AND OVERSEAS DEPLOYMENTS (2007).

Congress controls the purse strings, a President cannot sustain military efforts abroad without substantial financial support.¹⁵⁷ Congress has used this power to withdraw uniformed service members stationed in Vietnam, Somalia, and Rwanda.¹⁵⁸

While potent, this power is far from the perfect antidote to a hawkish president. For one, Congress is often the biggest proponent of military spending.¹⁵⁹ Recently, Congress increased the 2021 military budget to approximately \$24 billion *more* than the amount requested by President Biden.¹⁶⁰ Both parties continually seek to increase the budget,¹⁶¹ encouraging the President to use the forces that he has under his control.¹⁶² Cutting defense spending is notoriously difficult because no politician wants to appear unsupportive of “America’s troops” or unprepared for a conflict that suddenly emerges.¹⁶³ This political difficulty encourages high levels of defense spending and discourages spending cuts.¹⁶⁴

Moreover, defense contractors keep a tough grip on funding.¹⁶⁵ The industry as a whole spends hundreds of millions of dollars utilizing hundreds of lobbyists in an attempt

157. GRIMMETT, *supra* note 156, at 1.

158. *Id.* at 2–3.

159. See Jeff Stein & Aaron Gregg, *U.S. Military Spending Set to Increase for Fifth Consecutive Year, Nearing Levels During Height of Iraq War*, WASH. POST (Apr. 18, 2019, 2:02 PM), <https://perma.cc/N9DB-LH66>; MCFATE, *MERCENARIES AND WAR*, *supra* note 30, at 23 (“Contracting is now part of the American way of war. It is one of the few issues in Washington that enjoys true bipartisan support, as Republican and Democratic White Houses rely on military contractors more and more, perhaps for the wrong reasons.”).

160. Catie Edmondson, *Senate Passes \$768 Billion Defense Bill, Sending It to Biden*, N.Y. TIMES (Dec. 15, 2021), <https://perma.cc/2CWU-JHK7>.

161. See Stein & Gregg, *supra* note 159 (“[C]uts to military spending are unlikely in the foreseeable future.”).

162. Harvard Kennedy School, *Why Does US Foreign Policy Keep Failing?*, YOUTUBE (Sept. 2, 2014), <https://perma.cc/9EZG-T7B4> (examining the incentives for using the U.S. military to deal with global threats).

163. Michaels, *supra* note 19, at 1075.

164. *Id.*

165. See Dan Auble, *Capitalizing on Conflict: How Defense Contractors and Foreign Nations Lobby for Arms Sales*, OPEN SECRETS (Feb. 25, 2021), <https://perma.cc/8AD7-8GX5>.

to cement the role of defense contractors in the military.¹⁶⁶ Politicians from both sides of the aisle receive sizable donations; “the average member of Congress got \$179,000 in campaign contributions from defense companies during that period while members of the [House Armed Services Committee and Senate Armed Services committee] averaged \$250,000” from defense contractors.¹⁶⁷ PSCs also donate to politicians and have influenced government officials at the highest levels.¹⁶⁸ The revolving door theory seems to be at play here, as “73% percent of the 663 lobbyists employed by defense companies in 2020 formerly worked for the federal government.”¹⁶⁹ In essence, administrative agencies have been “captured” by the industries it seeks to regulate, helping to embed PSCs in the military apparatus.¹⁷⁰

Even if Congress sought to shed the private military industry’s undue influence, it would have an immensely difficult time trying to excise PSC funding from the national budget.¹⁷¹ As discussed above, the DOD lacks the means to “[r]eadily and comprehensively identify PSC contracts and personnel.”¹⁷² Part of this difficulty stems from the way PSC contractors are funded: contracts are sometimes funded through executive departments that are not military in nature, such as the Department of the Interior or the Department of Commerce.¹⁷³ This makes it “very difficult for Congress to

166. *See id.* (“Defense companies spend millions every year lobbying politicians and donating to their campaigns. In the past two decades, their extensive network of lobbyists and donors have directed \$285 million in campaign contributions and \$2.5 billion in lobbying spending to influence defense policy.”).

167. *See id.*

168. *See id.* For a comprehensive discussion of the political ties between DynCorp and the federal government, see ROSS EVENTON & DAVE BEWLEY-TAYLOR, GLOB. DRUG POL’Y OBSERVATORY, ABOVE THE LAW, UNDER THE RADAR: A HISTORY OF PRIVATE CONTRACTORS AND AERIAL FUMIGATION IN COLOMBIA 8 (2016).

169. Auble, *supra* note 165 (“No other sector has a higher percentage of lobbyists who also worked in the government.”).

170. *See* Mandy Smithberger, *Brass Parachutes: The Problem of the Pentagon Revolving Door*, POGO (Nov. 5, 2018), <https://perma.cc/EM8Z-B69K>.

171. *See* Michaels, *supra* note 19, at 1074.

172. GOV’T ACCOUNTABILITY OFF., *supra* note 113, at 8.

173. *See* Avant & Sigelman, *supra* note 17, at 251.

detect, target, and—if need be—attack particular streams of funding in order to influence policy via the purse.”¹⁷⁴ One of Congress’s most powerful tools for regulating the conduct of the President has been rendered ineffective, shielding PSCs from accountability.¹⁷⁵

Congress’s other constitutional powers do not fare much better. Congress has the enumerated powers to “[t]o raise and support Armies,” “[t]o provide and maintain a Navy,” “[t]o make Rules for the Government and Regulation of the land and naval Forces,” and “[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States.”¹⁷⁶ Together these powers authorize Congress to regulate both the conduct of military personnel and the size of the military.¹⁷⁷ Congress could pass force caps, or legislation limiting the size of the military force that the President can deploy.¹⁷⁸ If it wanted to, Congress could even abolish the military altogether.¹⁷⁹ These powers impose restrictions on where and how the President uses the military.¹⁸⁰ Even during times of conflict, Congress could require the President to comply with certain requirements on military use.¹⁸¹

Congress’s power to cap the number of military personnel is an insufficient check on the President’s ability to deploy PSCs.¹⁸² In reviewing several existing government data sources, the GAO determined that it was “*impossible* to identify all PSC contracts and personnel in these data sources.”¹⁸³ The impossibility in ascertaining where and how

174. Michaels, *supra* note 19, at 1074.

175. *See id.*

176. U.S. CONST. art. I, § 8.

177. Michaels, *supra* note 19, at 1076.

178. Vernon, *supra* note 62, at 375.

179. *Id.* at 1054.

180. For example, Congress passed the Universal Military Training and Service Act of 1951 requiring persons called to active duty service “to receive at least four months’ ‘full and adequate’ training prior to deployment overseas and prohibited the expenditure of funds to transport or maintain a servicemember overseas in violation of the provision.” ELSEA ET AL., CONGRESSIONAL AUTHORITY, *supra* note 85, at 34.

181. *Id.* at 32–34.

182. *See* McFate, *America’s Addiction*, *supra* note 145.

183. GOV’T ACCOUNTABILITY OFF., *supra* note 113, at 8 (emphasis added).

PSCs are operating potentially allows PSCs to circumvent any caps placed on their deployment.¹⁸⁴ Even if the presence of the primary contractor was readily known, contractors hire subcontractors—which are “invisible to U.S. government officials”—further complicating the matter of transparency.¹⁸⁵ There is also an issue of motivation. Force caps are a tool rarely used by Congress.¹⁸⁶ Despite hearing horrific stories of abuse and terror like in Nisour Square,¹⁸⁷ Congress routinely declines to rein in the number of contractors deployed overseas. In fact, the executive branch continues to use these contractors.¹⁸⁸ Privatization circumvents another key congressional tool, reinforcing the possibility of wanton use.¹⁸⁹

Comparatively, statutes and regulations may appear more robust but are still unable to adequately constrain PSC use. Hundreds of statutes and regulations govern the military.¹⁹⁰ The rules governing “inherently governmental functions” pertain specifically to PSCs.¹⁹¹ Congress defined an “inherently governmental function” in the FAIR Act to mean a function

184. *Id.*

185. McFate, *America’s Addiction*, *supra* note 145; see Charles Tiefer, *Restrain “Risky Business”: Treat High-Risk Private Security Contractors as Inherently Governmental*, 50 HARV. J. ON LEGIS. 209, 220 (2013) (noting that “PSCs diverted funds to [Afghan] warlords who have power over highways and over development projects”).

186. *Congressional Limitations and Requirements for Military Deployments and Funding*, CTR. FOR AM. PROGRESS 3 (Jan. 9, 2007), <https://perma.cc/G6R7-RA47> (stating that Congress has passed force caps only four times in American history).

187. Snukal & Gilbert, *supra* note 48, at 660.

188. See Max Fisher, *The Real Blackwater Scandal Is that the State Department Kept Hiring Them*, VOX (Jun. 30, 2014, 4:50 PM) <https://perma.cc/RLT7-QKPD> (describing how, even after the massacre, the State Department kept hiring Blackwater to secure its embassies and VIPs).

189. See Singer, *supra* note 43, at 217.

190. See generally, e.g., OFF. OF GEN. COUNS., DEPT. OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL (2016), <https://perma.cc/CW9Y-V5L9> (PDF).

191. JENNIFER K. ELSEA, CONG. RSCH. SERV., R40991, PRIVATE SECURITY CONTRACTORS IN IRAQ AND AFGHANISTAN: LEGAL ISSUES 14 (2010) [hereinafter ELSEA, PRIVATE SECURITY CONTRACTORS]. Additionally, for years, non-Iraqi PSCs were largely immune from Iraqi law, until the 2008 Status of Forces Agreement forfeited all contractor immunity. *New Status of Forces Agreement Subjects Government Contractors to Iraqi Law*, GIBSON DUNN (Dec. 1, 2008), <https://perma.cc/E5H8-RSBN>.

that is “so intimately related to the public interest as to require performance by Federal Government employees.”¹⁹² These functions are not meant to be performed by non-government actors.¹⁹³ Certain roles or functions cannot be outsourced, such as “federal employees at the National Energy Technology Laboratory,” or “the operation and maintenance of hydroelectric power-generating facilities at water resources projects of the Army Corps of Engineers.”¹⁹⁴

Regarding PSCs, Congress authorized the DOD to promulgate their own regulations pertaining to the “selection, training, equipping, and conduct of personnel performing private security functions under a covered contract in an area of combat operations.”¹⁹⁵ Subsequently, the DOD promulgated 32 C.F.R. § 159.2.¹⁹⁶ The DOD also promulgated 48 C.F.R. § 7.503, listing tasks that *shall* not be contracted out, including the “[t]he command of military forces, especially the leadership of military personnel who are members of the combat, combat support, or combat service support role.”¹⁹⁷

Other tasks *may* not be contracted out, depending on whether the nature of the task becomes inherently governmental.¹⁹⁸ These tasks include “[c]ontractors providing special non-law enforcement, security activities that do not directly involve criminal investigations, such as prisoner detention or transport and non-military national security details.”¹⁹⁹ The permissive “may” allows PSCs to perform tasks that appear, for all intents and purposes, inherently governmental. For example, PSCs were tasked with guarding the chief of the Coalition Provisional Authority—the transitional government of Iraq—and the Green Zone in

192. 31 U.S.C. § 501.

193. ELSEA, PRIVATE SECURITY CONTRACTORS, *supra* note 191, at 15.

194. JOHN R. LUCKEY ET AL., CONG. RSCH. SERV., R40641, INHERENTLY GOVERNMENTAL FUNCTIONS AND DEPARTMENT OF DEFENSE OPERATIONS: BACKGROUND, ISSUES, AND OPTIONS FOR CONGRESS 11 (2009).

195. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 862(a)(1), 122 Stat. 3, 254 (2008).

196. 32 C.F.R. § 159.2 (2023).

197. 48 C.F.R. § 7.503 (2023).

198. *Id.* § 7.503(d).

199. *Id.*

Baghdad, “the center of American power in Iraq.”²⁰⁰ If providing security to essential governmental officials and key facilities is not an inherently governmental function, it is difficult to imagine a task that is.

Another statute that ostensibly constricts the unbridled use of PSCs is 10 U.S.C. § 2465.²⁰¹ This statute requires that “funds appropriated to the Department of Defense may not be obligated or expended for the purpose of entering into a contract for the performance of firefighting or security-guard functions at any military installation or facility.”²⁰² Congress passed this statute in 1986, long before the wars in Iraq or Afghanistan.²⁰³ From the text of the statute—the portion referring to guarding “any military installation or facility”—it is clear that PSCs are prohibited from protecting military installations or facilities overseas.²⁰⁴ Yet executive agencies like the DOD have still contracted with PSCs to protect military installations and facilities.²⁰⁵ The DOD did this because it lacked the sufficient manpower to accomplish the tasks they were mandated to do.²⁰⁶ So, to alleviate the problem, Congress created exceptions to the blanket prohibition.²⁰⁷

Pursuant to post-9/11 legislation,²⁰⁸ the DOD promulgated 48 C.F.R. § 237.102-70.²⁰⁹ This regulation carved out exceptions for contracts “undertaken in response” to the attacks.²¹⁰ This freed up uniformed personnel, because in order for PSCs to be hired, the regulation required that “members of the Armed Forces are or would be used to perform the increased security-guard functions.”²¹¹ There were some

200. David Barstow, *Security Companies: Shadow Soldiers in Iraq*, N.Y. TIMES (Apr. 19, 2004), <https://perma.cc/4BNU-UV55>.

201. 10 U.S.C. § 2465.

202. *Id.*

203. *Id.*

204. *Id.*

205. ELSEA ET AL., CONGRESSIONAL AUTHORITY, *supra* note 85, at 1.

206. McFate, *America’s Addiction*, *supra* note 145.

207. See 48 C.F.R. § 237.102-70(c)(1) (2023) (listing the statutes that created exceptions to 10 U.S.C. § 2465).

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* § 237.102-70(c)(1)(i).

oversight mechanisms, such as requiring that PSCs were “supervised.”²¹² But, besides that, there were few limitations placed on PSCs guarding military installations.²¹³ For a sense of scope, according to an internal DOD audit, in 2011, PSCs provided security at thirty-three U.S. installations in Iraq.²¹⁴

Supplementing these binding regulations are non-binding policy directives. Congress passed a sense of Congress resolution²¹⁵ stating that tasks requiring the protection of people, equipment, and supplies “should ordinarily be performed by members of the Armed Forces” where the risks are uncertain and deadly force is likely to be initiated rather than used in self-defense.²¹⁶ The DOD, in an interpretive/policy statement, stated that U.S. “combat operations” are “inherently governmental functions.”²¹⁷ Interpretive/policy statements are not binding, because the DOD merely intends to advise the public of the agency’s interpretation of the statutes and rules it administers, rather than implement the statement with the force of law.²¹⁸

Despite the assemblage of statutes, regulations, and non-binding directives, the DOD and the State Department have contracted out inherently governmental functions to PSCs. Even though statutes prohibit contractors from performing inherently governmental functions, “reality has not conformed to this rule.”²¹⁹ PSCs have been drawn into

212. *Id.* § 237.102-70(c)(1)(ii)(b).

213. *Id.* § 237.102-70(c).

214. See generally U.S. DEP’T OF DEF., DOD OVERSIGHT OF PRIVATE SECURITY CONTRACTORS IN IRAQ WAS SUFFICIENT, BUT CONTRACTORS MAY NOT DETER ATTACKS ON OFFICE OF SECURITY COOPERATION-IRAQ ENDURING SITES, REPORT No. DODIG-20120-075 (2012).

215. A sense of Congress resolution is a non-binding concurrent resolution that “merely express the opinion of Congress.” CONG. RSCH. SERV., R98-825, “SENSE OF” RESOLUTIONS AND PROVISIONS 1 (2016).

216. Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 832, 122 Stat. 4356, 4535 (2008).

217. Department of Defense Instruction 1100.22, 1990.

218. See *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111 (D.C. Cir. 1993) (describing that an agency rule is binding when the “purported interpretive rule has ‘legal effect’”).

219. Andrew Finkelman, *Suing the Hired Guns: An Analysis of Two Federal Defenses to Tort Lawsuits Against Military Contractors*, 34 BROOK. J. INT’L L. 396, 402 (2009).

firefights with Al Qaeda,²²⁰ cartel organizations,²²¹ and other nefarious actors.²²² They accompany US forces.²²³ PSCs often fire first: in shooting incidents, DynCorp's PSCs fired first 62% of the time, whereas Triple Canopy's fired first 83% of the time.²²⁴ What is most shocking is that the Army's own website states that "[s]ecurity contractors often work side-by-side with soldiers and sometimes *take on roles traditionally performed by the military.*"²²⁵

This outsourcing of roles traditionally performed by the military can be attributed to the State Department's and DOD's needs to carry out mission objectives that, if not for PSCs, could not be accomplished.²²⁶ As discussed in Part II, the Bush Administration bit off more than it could chew in attempting to accomplish its goals of toppling Saddam Hussein and fighting terrorism in Afghanistan. PSCs were needed to fill the gaps at the expense of laws designed to prevent private actors from performing tasks that are reserved for government employees.²²⁷

220. *Id.*

221. Michaels, *supra* note 19, at 1013.

222. *Id.*

223. *See* Tiefer, *supra* note 185, at 232

If the Army hired PSC groups to go along on Army missions as a reserve in case of big trouble, those PSCs would not need to have the authority over liberty the way a parole board does. Rather, PSC reserve units would be there to take part in combat. So even with advanced planning and rules of engagement, PSCs cannot go with Army missions as their reserve. Hence, by any definition, such reserve units would perform an inherently governmental function, regardless of their not having authority over liberty. When PSCs take part in this type of violence, they demonstrate the reason war, and its high-risk situations, is the business of government, and not a place where a business (the PSC business) can wholly replace government.

224. Matthew C. Dahl, *Soldiers of Fortune—Holding Private Security Contractors Accountable: The Alien Tort Claims Act and Its Potential Application to Abtan, et al. v. Blackwater Lodge and Training Center, Inc.*, et al., 37 DENV. J. INT'L L. & POL'Y 119, 134 (2008).

225. Gary Schaub Jr. & Volker Franke, *Contractors as Military Professionals*, U.S. ARMY (Mar. 25, 2010), <https://perma.cc/7F2C-6PGU>.

226. *Id.*

227. McFate, *America's Addiction*, *supra* note 145.

Laws meant to restrict PSCs instead enabled their largely unfettered use.²²⁸ Ineffective laws—whether gutted because of exceptions or executive departments overlooking tasks that should be considered inherently governmental—ensure that PSCs can be deployed without much oversight or accountability.²²⁹ As one scholar stated, “[s]ome congressional tools are simply harder to use to control contractors than the military.”²³⁰ The next Subpart will explain why the President would want to take advantage of this ineffective legal scheme.

B. *The Anti-Democratic Advantages to Using PSCs*

Contrary to Machiavelli’s musings that private armies are “useless and dangerous,”²³¹ PSCs present several advantages to interested buyers. The ability to call up a robust fighting force at a moment’s notice is seductive to political and military leaders.²³² War-making is fraught with an array of political landmines.²³³ A President must navigate a system of checks and balances, regardless of whether it impedes his ability to take “swift” action.²³⁴ For example, a Congress politically opposed to the President’s desire to initiate conflict may implement force caps.²³⁵ As a result, the President could continue with a potentially undersized force—evoking criticism for starting a war that could never had been won—or be forced abandon his action.²³⁶ This is not to mention the onerous task

228. See Michaels, *supra* note 19, at 1062.

229. *Id.*

230. Avant & Sigelman, *supra* note 17, at 251.

231. MACHIAVELLI, *THE PRINCE* 75 (Rufus Goodwin., trans., Duke University Press 2012).

232. See Michaels, *supra* note 19, at 1037–48.

233. See, e.g., *id.* at 1026 (recounting the situation in the Balkans, where the Clinton administration was hamstrung by, among other things, “U.N. arms embargos, hesitant allies, wary adversaries” and “congressional opposition”).

234. John Yoo, *Trump’s Syria Strike Was Constitutional*, NAT’L REV. (Apr. 13, 2017, 8:00 AM), <https://perma.cc/493D-BVEN>.

235. Vernon, *supra* note 62, at 375.

236. See Michaels, *supra* note 19, at 1063 (“The president’s expectation of political opposition provides crucial ex ante checks on executive adventurism.”).

of rallying citizen support for the war.²³⁷ The decision to prolong a war, even if the war was initially popular, carries the risk of public opinion turning sour.²³⁸

PSCs offer a cure-all to the President's woes. PSCs can be used to supplement existing uniformed personnel because they are not subject to force caps.²³⁹ In the eyes of Congress, PSCs are not considered equivalent to uniformed troops, permitting the President to circumvent limitations placed on him.²⁴⁰ In other words, including PSCs in the President's national security calculus could "evade[] . . . key veto points in the policy-making process."²⁴¹ This concern is grounded in past executive action. In 2000, Congress placed force caps on the number of uniformed personnel carrying out Plan Colombia, a United States-Colombian initiative to combat Colombian drug cartels and left-wing insurgent groups in Colombia.²⁴² To circumvent these caps, the State Department contracted with DynCorp to, among other things, train local law enforcement and "pilot[] crop-dusters to destroy coca fields."²⁴³

Even without formal force caps, employing PSCs allows the President to sidestep the politically unpopular decisions to institute a draft or call up the National Guard to augment the all-voluntary military.²⁴⁴ Acting as a "force multiplier," PSCs perform services, such as base or convoy security, which frees up uniformed personnel to accomplish other tasks.²⁴⁵ This leaves the President with "a great alternative to lobbying Capitol Hill and the American people for permission to

237. See Kelly A. McHugh, *How Elected Leaders Prolong Unpopular Wars: Examining American Policy During the Vietnam War and French Policy During the Algerian War*, 2 COGENT SOC. SCI. 1 (2016).

238. *Id.* at 10–14.

239. McFate, *America's Addiction*, *supra* note 145.

240. *Id.*

241. Avant & Sigelman, *supra* note 17, at 249.

242. *Congressional Limitations and Requirements for Military Deployments and Funding*, *supra* note 186, at 3.

243. Michaels, *supra* note 19, at 1025; see Vernon, *supra* note 62, at 375–76.

244. Peter W. Singer, *The Dark Truth About Blackwater*, BROOKINGS INST. (Oct. 2, 2007), <https://perma.cc/4WDV-X6ZE> (describing expanding U.S. regular forces, or calling up National Guard, as "politically undesirable").

245. COTTON ET AL., *supra* note 76, at 45.

increase the size of the military quickly.”²⁴⁶ For example, at the onset of the Iraq and Afghanistan wars, the undersized all-volunteer military faced difficult and demanding missions.²⁴⁷ To remedy the situation, the DOD and the State Department hired PSCs to provide site and personnel security.²⁴⁸ Private armies provided the necessary “surge strength” to enable uniformed personnel to perform other vital actions.²⁴⁹

This advantage is enhanced by the fact that PSCs tend to evade media coverage.²⁵⁰ Troop deployments are often—but not always²⁵¹—met with a flurry of newspaper coverage and other fanfare.²⁵² Absent a bombshell media story, like Nisour Square²⁵³ or Abu Ghraib,²⁵⁴ the public is generally unaware of PSCs.²⁵⁵ Research confirms this.²⁵⁶ Even though private contractors outnumbered uniformed personnel during the Iraq War, coverage of PSCs amounted to a mere “blip” in comparison to their uniformed counterparts.²⁵⁷ Casualty figures are routinely collected and released by the military, but they exclude contract personnel, adding to PSC secrecy.²⁵⁸ Of the contractor deaths uncovered by reporters submitting Freedom of Information Act (FOIA) requests, “more private

246. Michaels, *supra* note 19, at 1063.

247. See McFate, *America’s Addiction*, *supra* note 145.

248. Deborah Avant, *The Privatization of Security and Change in the Control of Force*, 5 INT’L STUD. PERSPS. 153, 155 (2004); see also ELSEA ET AL., CONGRESSIONAL AUTHORITY, *supra* note 85, at 7.

249. Avant, *supra* note 248, at 155.

250. See Avant & Sigelman, *supra* note 17, at 245.

251. See Myre, *supra* note 118 (reporting that U.S. military presence in Africa is largely unknown to the American public).

252. See Avant & Sigelman, *supra* note 17, at 245.

253. Snukal & Gilbert, *supra* note 48, at 660.

254. Eliza Relman, *Pentagon Releases 198 Abuse Photos in Long-Running Lawsuit. What They Don’t Show Is a Bigger Story.*, ACLU (Feb. 5, 2016) <https://perma.cc/C9W2-MZRB>.

255. Avant & Sigelman, *supra* note 17, at 245.

256. See *id.* at 246–47 (comparing media coverage of PSCs compared to uniformed personnel).

257. *Id.*

258. *Id.* at 245.

military contractors have died in Iraq and Afghanistan than all the U.S. troops deployed to those countries.”²⁵⁹

PSCs offer several anti-democratic advantages to the President. Privatization of the military subverts congressional checks, such as force caps. PSCs also avoid public checks because of their general unknowability. This provides the President with the cover to unilaterally deploy troops with little fanfare or restraint.²⁶⁰ This endangers both American national security and the peoples of other countries for reasons explored in the next Subpart.

C. *Dangers in the Unbridled Use of PSCs*

Introducing PSCs into an active warzone is not without risks. Privatizing war has the potential to generate “self-perpetuating” conflicts, because private companies are, by definition, businesses driven by the profit motive; *ergo*, more conflict equals more contracts created.²⁶¹ This is not simply theory—this has *already* happened.²⁶² For years, the DOD contracted out its *entire* supply chain (that is, food, ammunition, fuel, and more) to private contractors in Afghanistan.²⁶³ During those years, private contractors paid local warlords in exchange for safe passage, resulting in tens of millions of dollars fueling local insurgents and corruption.²⁶⁴ Private contractors, wanting to preserve their lucrative contracts, continued this pay-for-passage scheme for years.²⁶⁵ The U.S. government, by paying private contractors, fuels the exact instability it was trying to cure.²⁶⁶

259. Micah Zenko, *Mercenaries Are the Silent Majority of Obama’s Military*, FOREIGN POL’Y (May 18, 2016), <https://perma.cc/K9K4-XKV8>.

260. See Michaels, *supra* note 19, at 1062 (stating that the President bypassing Congress by using PSCs could compromise “the confidence of the People in the democratic practices and institutions of this nation”).

261. Singer, *supra* note 43, at 197.

262. WARLORD, INC., *supra* note 91.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

An additional problem inherent in using PSCs is the principal-agent problem.²⁶⁷ The principal—here, the United States—acts in its own self-interest.²⁶⁸ The agent—PSCs—also acts in its own self-interest.²⁶⁹ This generates a problem. The principal’s interests are not perfectly aligned with the agent’s interest, resulting in unintended or undesirable outcomes.²⁷⁰ Despite the plethora of laws and policies designed to reduce the risk of adverse outcomes, the principal-agent problem is extremely difficult to resolve and unlikely to disappear, especially because the President will likely rely on PSCs in future conflicts.²⁷¹

Advocates, as well as critics, of PSCs envision future scenarios where the President decides to heavily rely on PSCs, much like the plan suggested by Erik Prince. Imagine a President who wants to deploy PSCs as primary soldiers to deal with instability in Africa or cartel violence in Latin America. Relying on PSCs would permit the President to engage in situations where he might normally decline to intervene, whether because of unpopular support or the impact to international relations. A fully capable military force without the pressures of traditional political checks incentivizes the President to take more military risks than he would otherwise.²⁷² These scenarios—where PSCs are the primary mode of force used by the United States—carry two primary disadvantages. The first is the threat to U.S. national security and the second is the risk of human rights violations perpetrated by PSCs.

A two-tiered military, one subject to a plethora of congressional constraints and the other not, poses a threat to national security. Because PSCs have monetary incentives to receive and expand contracts and because the President has his own foreign policy objectives, the potential for mission

267. Charles Mahoney, *Buyer Beware: How Market Structure Affects Contracting and Company Performance in the Private Military Industry*, 26 SEC. STUD. 30, 38 (2017).

268. *Id.*

269. *Id.*

270. *Id.*

271. See *supra* notes 122–124 and accompanying text.

272. Avant & Sigelman, *supra* note 17, at 77.

creep is high.²⁷³ Mission creep is the gradual expansion of military objectives during the course of a military campaign, resulting in an unplanned long-term commitment.²⁷⁴ In the same way that the invasion of Afghanistan originated as a mission to eradicate Osama Bin Laden yet expanded to rebuilding the country and an invasion of Iraq, conflicts that start small can expand to larger, more onerous engagements.²⁷⁵ An ambitious President could enter conflicts that he normally would not have entered and become bogged down in the gradual expansion of those conflicts.²⁷⁶ Repercussions include the loss of life, draining of tax resources, diverting focus away from other key foreign policy objectives, the risk of drawing in uninformed service members, and other consequences.²⁷⁷

The second disadvantage is the possibility of PSCs committing human rights abuses. It is no secret that PSCs conduct human rights abuses ranging from the killing of civilians in Nisour Square to the daily terrorization of local citizens.²⁷⁸ Story after story exists of innocent bystanders being killed by stray bullets shot by PSCs.²⁷⁹ Other accounts describe PSCs indiscriminately firing to clear traffic jams, crashing into automobiles in high-speed pursuits, and otherwise disrupting civilians' lives.²⁸⁰ Iraqi citizens tend to call all contractors "Blackwater" because of the mark that the company left on

273. See Michaels, *supra* note 19, at 1099 ("[P]rivate military contractors may deliberately take longer, say, to train and certify the competency of a domestic police force; or they may slow down their rate of coca-burning work to get paid for a few extra days or weeks.").

274. *Id.* at 1089.

275. Michaels, *supra* note 19, at 1100.

276. Avant & Sigelman, *supra* note 17, at 77.

277. See Michaels, *supra* note 19, at 1100 ("[R]ecognizing the uncertainties of dangerous assignments and crediting the service providers with the ability to adapt and change course when exigencies require doing so leaves the government vulnerable to more than economic abuses of the contractual relationship.").

278. See HUMAN RTS. FIRST, PRIVATE SECURITY CONTRACTORS AT WAR: ENDING THE CULTURE OF IMPUNITY 1–10 (2008), <https://perma.cc/CGK7-7EXQ> (PDF).

279. *Id.* at 9–10.

280. *Id.*

them.²⁸¹ To the people of Iraq and Afghanistan, PSC presence often meant violence and abuse.²⁸² Despite Nisour Square and the numerous allegations of human rights violations, the State Department and the DOD continue to hire PSCs accused of human rights violations for security support.²⁸³

Introducing PSCs to more conflict areas opens the door to more abuses.²⁸⁴ With little oversight, human rights violations are likely.²⁸⁵ People of those countries will suffer.²⁸⁶ To add insult to injury, convicted offenders may even receive pardons—which happened to those Blackwater contractors who committed the massacre at Nisour Square.²⁸⁷ To other countries—and to the people of those countries—what message does that send?

Other countries will continue to use PSCs.²⁸⁸ The multibillion-dollar private military industry will continue to grow.²⁸⁹ The private military industry is made up of multinational corporations with subsidiaries, has its own trade associations, and is traded on stock exchanges.²⁹⁰ The market is currently U.S.-centric as companies fill their management with former U.S. generals and soldiers.²⁹¹ But the market is shifting to fulfill the needs of other countries.²⁹² Other

281. Al Jazeera, *Blackwater’s Erik Prince: Iraq, Privatizing Wars, and Trump | Head to Head*, YOUTUBE (Mar. 8, 2019), <https://perma.cc/XDF7-FURP>.

282. See Michaels, *supra* note 19, at 1096.

283. Fisher, *supra* note 188.

284. See Michaels, *supra* note 19, at 1096 (“Unhinged from the narrative of military honor, privateers may never have internalized the ethos of honor and dignity that is inculcated in American GIs.”).

285. *Id.*

286. *Id.*

287. Laurel Wamsely, *Shock and Dismay After Trump Pardons Blackwater Guards Who Killed 14 Iraqi Civilians*, NPR (Dec. 23, 2020, 5:44 PM), <https://perma.cc/E7L3-Q657>.

288. See McFATE, *MERCENARIES AND WAR*, *supra* note 30, at 23 (“Heavy U.S. reliance on military contractors has catalyzed the international mercenary trade . . .”).

289. *Id.*

290. Sean McFate, *Secrets of Modern Mercenaries: Inside the Rise of Private Armies*, SALON (Jan. 15, 2015), <https://perma.cc/WH4Z-KTB5>.

291. *Id.*

292. See McFATE, *MERCENARIES AND WAR*, *supra* note 30, at 23 (“Others are imitating the American model, and every day new private military

countries may model the “bad behavior” that U.S. PSCs commit.²⁹³ If the United States continually hires PSCs and does not constrain them from committing human rights violations, other countries who hire PSCs will see this as condoning that behavior.²⁹⁴

PSCs pose threats both to national security and the human rights of other countries’ citizens.²⁹⁵ These concerns will not go away on their own. The detrimental effect that the United States’s current and future use of PSCs warrants stronger controls over the use of PSCs than those that currently exist. The next Part discusses why incorporating PSCs into the War Powers Resolution is an important start in restraining the President’s potentially unbridled use of PSCs.

III. INCORPORATING PSCS INTO THE WAR POWERS RESOLUTION

A. Congress’s Repudiation of the Imperial President

Following the Gulf of Tonkin incident in 1964,²⁹⁶ Congress passed the Gulf of Tonkin Resolution, which authorized then-President Lyndon Johnson to “take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression” by “the Communist regime in North Vietnam.”²⁹⁷ Less than a decade later, Congress repealed the resolution.²⁹⁸ This was in part because Congress, concerned about the advent of the “imperial president,”²⁹⁹ grew increasingly wary of a President

groups emerge from countries like Russia, Uganda, Iraq, Afghanistan, and Colombia.”).

293. See Michaels, *supra* note 19, at 1120.

294. *Id.*

295. *Id.*

296. See Robert Gray Bracknell, *Real Facts, “Magic Language,” the Gulf of Tonkin Resolution, and Constitutional Authority to Commit Forces to War*, 13 NEW ENG. J. INT’L & COMP. L. 167, 170 (2007).

297. H.J. Res. 1145, Pub. L. No. 88–408 (1964).

298. *Gulf of Tonkin Resolution Is Repealed Without Furor*, N.Y. TIMES (Jan. 14, 1971), <https://perma.cc/4MAL-R4TG>.

299. See generally ARTHUR M. SCHLESIGNER, THE IMPERIAL PRESIDENCY (1973).

determined to wage an unpopular and unsuccessful war.³⁰⁰ Fueled by a desire to constrain then-President Richard Nixon—who was already politically weakened from the Watergate Scandal—from entering conflicts that could harm the United States, Congress passed the War Powers Resolution³⁰¹ over the President’s veto.³⁰²

In passing the War Powers Resolution, Congress sought to make itself an equal partner to the President in war-making decisions.³⁰³ The Resolution’s Consultation Provision requires the President to consult with Congress before deploying troops into “hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.”³⁰⁴ Deployments relating solely to the “supply, replacement, repair, or training of [U.S. Armed Forces]” are excluded from this provision.³⁰⁵ The Reporting Requirement obliges the President to submit a detailed report to Congress within forty-eight hours of an initial deployment.³⁰⁶ After submitting the report, the President then has a sixty-day window to

300. See *Congressional Control of Presidential War-Making Under the War Powers Act: The Status of a Legislative Veto After Chadha*, 132 U. PA. L. REV. 1217, 1220–26 (1984) [here *Congressional Control*]. Representative Clement Zablocki introduced the War Powers Resolution as part of the 93rd Congress. During a Committee debate, Representative Zablocki explained that the War Powers Resolution

gives this Congress a historic opportunity to correct the imbalance in warmaking powers, which through the practice of recent years have swung too heavily to the President . . . [t]he defacto concentration of plenipotentiary war powers in the hands of the President has subverted the letter and the spirit of the Constitution.

119 CONG. REC. 21209 (June 25, 2973) (statement of Rep. Clement Zablocki).

301. 50 U.S.C. §§ 1541–1548.

302. *Congressional Control*, *supra* note 300, at 1223.

303. See 50 U.S.C. § 1541 (“It is the purpose of this chapter to . . . insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities . . .”); see also *Realism, Liberalism, and the War Powers Resolution*, 102 HARV. L. REV. 637, 637 (1987) (“[T]he resolution represents the zenith of congressional effort to increase legislative control over decisions to commit United States armed forces abroad.”).

304. 50 U.S.C. § 1542.

305. *Id.* § 1543.

306. *Id.*

withdraw troops, unless Congress authorizes a longer deployment.³⁰⁷ The Resolution only applies when “U.S. Armed Forces are introduced,” which excludes PSCs.³⁰⁸

Since the inception of the War Powers Resolution, many commentators have argued that it has failed to constrain the President from unilaterally inserting U.S. Armed Forces into hostilities.³⁰⁹ There is an abundance of examples of when the President deployed troops into hostilities without congressional authorization despite the War Powers Resolution being in effect.³¹⁰ The President has unilaterally deployed troops into Grenada, Kosovo, El Salvador, and Lebanon, among other areas, without consulting Congress beforehand, even though the circumstances of each deployment likely should have involved Congress.³¹¹ For example, the U.S. Air Force initiated a bombing campaign against Serbia in 1997.³¹² Using military forces in an active hostility without express authorization by Congress and in violation of the sixty-day clock illustrates one example of the President contravening the War Power Resolution.³¹³ There have been calls to reform or abolish the War Powers Resolution because of these failures.³¹⁴

307. *Id.* § 1544.

308. *Id.* § 1543; see Michaels, *supra* note 19, at 1076 (“[T]he War Powers Resolution applies *only* to the deployment of U.S. Armed Forces.” (emphasis added)).

309. See, e.g., Martin Wald, *The Future of the War Powers Resolution*, 36 STAN. L. REV. 1407, 1445 (1984) (“[U]nless Congress accepts the responsibility of asserting its political will in individual situations, the President will fill the vacuum, and the WPR will be destined for impotence.”).

310. See John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673, 1676 (2000) (“[P]residents have committed forces to combat at least 125 times in the Republic’s 210 year history, although most of these interventions were either small in scale or had received legislative support.”); Donald A. Dechert, III, *Perpetual Warfare: Proposing A New American Constitutional Amendment for the War Powers*, 52 VAL. U. L. REV. 457, 491–492 (2018).

311. See Geoffrey Corn, *Triggering Congressional War Powers Notification: A Proposal to Reconcile Constitutional Practice with Operational Reality*, 14 LEWIS & CLARK L. REV. 687, 710.

312. *Id.*

313. *Id.*

314. See, e.g., Corn, *supra* note 311, at 727.

Many scholars also believe that the War Powers Resolution is unconstitutional.³¹⁵ These scholars contend that the War Powers Clause³¹⁶ does not confer on Congress the authority to restrict the President’s ability to introduce U.S. Armed Forces into areas of hostility.³¹⁷ This is because the Framers endowed the President, not Congress, with the primary responsibility for war-making.³¹⁸ Consequently, every President since Nixon has refused to explicitly acknowledge the War Powers Resolution as a constraint on their authority.³¹⁹ Presidents (or at least their lawyers) carefully use the language of acting “concurrently” to the War Powers Resolution, not pursuant to, because otherwise it would recognize the constitutionality of the War Powers Resolution.³²⁰ Also, the Office of Legal Counsel argued that the sixty-day provision implicitly recognizes the President’s inherent authority to engage in “limited engagements.”³²¹ In

315. See, e.g., Robert F. Turner, *The War Powers Resolution at 40: Still an Unconstitutional, Unnecessary, and Unwise Fraud that Contributed Directly to the 9/11 Attacks*, 45 CASE W. RESV. J. INT’L L. 109, 110–14 (2012). The Concurrent Resolution Provision may violate *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983)—which outlawed legislative vetoes—rendering this provision unconstitutional. Turner, *supra* note 315, at 114. Some scholars, however, believe this provision is still constitutional, depending on the degree of congressional encroachment of executive power. See Wald, *supra* note 309, at 1429–36.

316. U.S. CONST. art. I, § 8, cl. 11.

317. See Turner, *supra* note 315, at 117 (contending that the Resolution is “outrageous” because it unconstitutionally infringes the President’s war powers). *But see* Bennett C. Rushkoff, *A Defense of the War Powers Resolution*, 93 YALE L.J. 1330, 1348 (1984) (contending that the President cannot initiate hostilities without some form of congressional involvement).

318. Turner, *supra* note 315, at 110.

319. GRIMMETT, *supra* note 156, at 2.

320. See Flynn, *supra* note 140, at 1030; *see also* BARBARA SALAZAR TORREON & SOFIA PLAGAKIS, CONG. RSCH. SERV., R42738, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–2021, at 22–28 (2021) (finding that Presidents do in fact use “concurrently” instead of “pursuant to” when speaking about the War Powers Resolution).

321. See Memorandum Opinion from Caroline D. Krass, Principal Deputy Assistant Att’y Gen., Off. of Legal Counsel, to the Att’y Gen., Authority to Use Military Force in Libya 7, 14 (Apr. 1, 2011), at 8–9 (“By allowing United States involvement in hostilities to continue for 60 or 90 days, Congress signaled in the WPR that it considers congressional authorization most critical for ‘major, prolonged conflicts such as the wars in Vietnam and

sum, opponents of the War Powers Resolution argue that it is at best ineffective, and at worst, unconstitutional.

But this criticism is only one side of the story. Despite a hawkish executive branch, the War Powers Resolution has moved the needle in achieving its aspirational goal of constraining the imperial president.³²² First, executive military actions receive greater congressional scrutiny.³²³ Presidents, concurrent to the War Powers Resolution, have submitted 136 reports to Congress informing them of military action.³²⁴ This matters, because “forty-eight-hour reports are the *foundation* of the WPR, and they are a primary means of ensuring transparency and oversight by our elected representatives in the use of U.S. armed forces abroad.”³²⁵ Knowing whether the President has deployed military forces is the first step in ensuring the President conforms to the rule of law.³²⁶

While many of the formal components of the War Powers Resolution have had mixed success, the “normative effects” of the War Power Resolution have served as real restraints on presidential action.³²⁷ Threats to invoke the War Powers Resolution “may have been helpful in getting U.S. forces out of Grenada, in keeping the number of military advisers in El Salvador limited to fifty-five, and in prodding Congress to take a stand on authorizing the war against Iraq.”³²⁸ Additionally, in 2020, a concurrent resolution passed by both the House and the Senate sought to curtail then-President Trump’s ability use the military against the Islamic Republic of Iran.³²⁹ Though Trump vetoed the resolution, congressional disapproval raises

Korea,’ not more limited engagements.” (quoting Deployment of U.S. Armed Forces into Haiti, 18 Op. O.L.C. 173, 176 (1994)).

322. See Rushkoff, *supra* note 317, at 1348.

323. GRIMMETT, *supra* note 156, at 14.

324. See Bridgeman, *supra* note 24 (compiling a comprehensive database of forty-eight-hour reports).

325. *Id.*

326. *Id.*

327. Michael Benjamin Weiner, *A Paper Tiger with Bite: A Defense of the War Powers Resolution*, 40 VAND. J. TRANSNAT’L L. 861, 892 (2007).

328. CONG. RSCH. SERV., R42699, THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICE 63 (2019) [hereinafter CONCEPTS AND PRACTICE].

329. Patrick Hulme, *The Deterrent Threat of a Vetoed War Powers Resolution*, LAWFARE (May 26, 2020), <https://perma.cc/6SSY-SQ6N>.

“significant political risks” if the President’s actions turn sour because Congress could argue to the public that “the president had disobeyed the explicit will of the legislature and with disastrous results.”³³⁰ Thus, Congress can encourage presidential restraint even without formally invoking the provisions of the War Powers Resolution.³³¹

As recently as 2021, new legislation has been proposed to reform the statute.³³² The Miller Center’s National War Powers Commission Report urged repealing and replacing the War Powers Resolution.³³³ National security heavy-weights gathered over a period of fourteen months to draft the “War Powers Consultation Act of 2009,” a revamp of the existing statute.³³⁴ While an impressive document, the one major actor that tends to get overlooked is not a political branch, but PSCs. Nowhere in the Miller Center’s final report did it mention the relevance of PSCs to the President’s ability to wage war—an absence made even more palpable considering that, at the time of the report, PSCs were extensively used throughout Iraq and Afghanistan.³³⁵ With such an important actor left out of the conversation, it is imperative that PSCs be included in the War Powers Resolution.

B. *Modernizing the War Powers Resolution for the Twenty-First Century*

It is arguably harder to hold PSCs accountable than members of the U.S. Armed Forces for their unlawful actions. As a necessity, PSCs must be integrated into the War Powers Resolution. Unlike their uniformed counterparts, the President has no obligation to consult with Congress before introducing PSCs into hostilities.³³⁶ Nor does he have any obligation to

330. *Id.*

331. *Id.*

332. Katherine Ebright, *A Bipartisan Bill to Rein in Presidential War-Making*, BRENNAN CTR. FOR JUST. (Sept. 30, 2021), <https://perma.cc/VR66-6X3L>.

333. JAMES A. BAKER III ET AL., NAT’L WAR POWERS COMM’N: MILLER CTR. OF PUB. AFFAIRS, NATIONAL WAR POWERS COMMISSION REPORT 20–26 (2008), <https://perma.cc/7T6D-GUU4> (PDF).

334. *Id.* at 35.

335. *See supra* notes 89–99 and accompanying text.

336. *See Michaels, supra* note 19, at 1076.

report to Congress on the status of those private soldiers.³³⁷ Congress also lacks the authority to withdraw, by way of a concurrent resolution, deployed PSCs.³³⁸ Instead, Congress has to rely on the ineffectual tools analyzed in Part II. Without the fiat of the War Powers Resolution, congressional attempts to threaten the President with invoking the statute is meaningless. The mere fact that the President can deploy PSCs without any input from Congress should remind us why the War Powers Resolution was passed in the first place—to prevent another Vietnam.³³⁹

Congress should extend the application of the existing War Powers Resolution beyond members of the U.S. Armed Forces to include PSCs.³⁴⁰ Including PSCs would reflect the “reality of modern war fighting.”³⁴¹ Incorporating PSCs into this landmark statute advances the decades-long desire to “insure that the collective judgement of both the Congress and the President” are reflected in war-making decisions.³⁴² There are several ways to accomplish this objective, and the following Section analyzes the advantages and disadvantages of each solution.

1. Eliminate the “Armed Forces” and Keep the “United States”

One proposed solution is to broaden the scope of the War Powers Resolution by eliminating the phrase “Armed Forces” and keeping the phrase “United States.”³⁴³ Thus, the words “Armed Forces” would be omitted throughout the statute.³⁴⁴ The statute could then be modified to encompass “any combat

337. *Id.*

338. *Id.*

339. See Bejesky, *supra* note at 23, at 66.

340. See Michaels, *supra* note 19, at 1122 (referencing incorporating PSCs into the War Powers Resolution); see also Kimberly N. Brown, “We the People,” *Constitutional Accountability, and Outsourcing Government*, 88 IND. L.J. 1347, 1398 (2013) (same).

341. Julia L. Chen, *Restoring Constitutional Balance: Accommodating the Evolution of War*, 53 B.C. L. REV. 1767, 1801–02 (2012).

342. 50 U.S.C. § 1541.

343. Chen, *supra* note 341, at 1801.

344. *Id.*

operation by the United States.”³⁴⁵ Any actor that represents the United States, such as the “military, government civilians, contractors, [unmanned aerial vehicles (UAVs)], and other technological innovations” would be covered under the modified War Powers Resolution.³⁴⁶ While this solution has merit, some flaws may still render it ineffective.

Applying the War Powers Resolution to anyone acting on behalf of the United States for any combat operation would be both an overinclusive and underinclusive application of the law. For example, the Consultation Provision reads, in part, “The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities.”³⁴⁷ Omitting the words “Armed Forces” and applying the statute wholesale to “the United States” would raise the possibility of unintentionally including actors that logically should not be subject to the War Powers Resolution. Civilians working alongside U.S. Armed Forces, such as those that work for the United States Agency for International Development (USAID) or backline contractors providing logistical support, might unintentionally be captured by this reworked statute.³⁴⁸ Requiring the President to consult with Congress before sending government aid workers or logistical contractors to other countries might impair swift action to areas that need immediate assistance.³⁴⁹ These workers are not the type of individuals that the framers of the War Powers Resolution, or the national security apparatus, intended to reach.³⁵⁰

Even if there are some actors acting on behalf of the United States, like clandestine forces or UAVs, it is not clear that the War Powers Resolution is the proper mechanism to promote transparency and accountability. One of the many criticisms of the War Powers Resolution is that it currently hampers the President’s ability to act in a swift, decisive

345. *Id.* at 1802.

346. *Id.*

347. 50 U.S.C. § 1542.

348. *See* Chen, *supra* note 341, at 1801.

349. *See* Yoo, *supra* note 310, at 1705.

350. *See* Chen, *supra* note 341, at 1777 (discussing Congress’s rejection of Senator Eagleton’s proposal to include civilian personnel).

manner.³⁵¹ A broad application of the War Powers Resolution to encompass clandestine forces or UAVs would encourage accountability at the expense of warfighting.³⁵² Even the most robust advocates of maintaining congressional input acknowledge that the balance between national security and accountability is not zero-sum.³⁵³ Perhaps there is a need for more accountability, evidenced by the lack of consultation by then-President Trump to target and kill Iranian Major General Qassem Soleimani.³⁵⁴ Despite this concern, the War Powers Resolution may not be the proper avenue to accomplish this.

Moreover, dramatically expanding the scope of the War Powers Resolution might cause the President to outright reject the binding effect of the statute. A President faced with an even tighter straitjacket on his war powers would not react too kindly.³⁵⁵ Requiring the President to consult, report, and notify Congress regarding a plethora of new actors could be too burdensome. The President could react by emphasizing the unconstitutionality of the War Powers Resolution, posing credibility issues to the statute by showing flagrant disregard for its provisions.³⁵⁶ Courts decline to hear suits dealing with the War Powers Resolution, so Congress will not have recourse to challenge the President's action in the courts.³⁵⁷ Broadening the statute could render the whole statute ineffective by encroaching too far on the President's ability to wage war.

Furthermore, omitting the phrase "Armed Forces" could result in an underinclusive application of the statute. Clever lawyers at the Office of Legal Counsel (OLC) and the

351. See Yoo, *supra* note 310, at 1705.

352. See Baker et al., *supra* note 333, at 14.

353. See *id.* at 29; see also Chen, *supra* note 341, at 1780 (noting Congress's acknowledgement "that there would be cases requiring expediency by the Executive").

354. See Scott R. Anderson, *Did the President Have the Domestic Legal Authority to Kill Qassem Soleimani?*, LAWFARE (Jan. 3, 2020, 4:49 PM), <https://perma.cc/8KLL-4ZK3> (reporting that then-President Trump did not consult Congress prior to the drone strike on Iranian Major General Qassem Soleimani).

355. See GRIMMETT, *supra* note 156, at 2.

356. See Baker et al., *supra* note 333, at 50 ("Contentious debates about the war powers have imposed great costs on both the credibility of our government and the strength of our national security.").

357. See generally Garcia, *supra* note 142.

Department of Justice (DOJ) get around supposedly clear laws. For example, government lawyers have interpreted the word “torture” not to include “enhanced interrogation”³⁵⁸ and interpreted “imminent” to permit drone strikes of U.S. citizens for feared future acts of violence.³⁵⁹ “United States” could be interpreted to apply to anyone formally employed by the federal government—excluding contractors that are employed on an ad-hoc basis. By attempting to include a broad range of actors, PSCs could inadvertently not be included. These disadvantages make this option an inept solution.

2. Explicitly Include “Private Security Contractors”

This Note proposes that the phrase “Private Security Contractors” be explicitly inserted alongside the words “United States Armed Forces.”³⁶⁰ Every clause that mentions the “United States Armed Forces” would also include the phrase “Private Security Contractors.”³⁶¹ The War Powers Resolution would apply in full effect to PSCs. The President would have to consult with Congress before introducing PSCs “into hostilities or into situation where imminent involvement in hostilities is clearly indicated by the circumstances.”³⁶² The President would have to submit forty-eight-hour reports detailing the status of

358. Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., Off. of Legal Counsel, to William J. Haynes II, Gen. Counsel of the Dep’t of Def., Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States (Mar. 14, 2003).

359. U.S. Dep’t of Just., Memorandum for the Attorney General Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi (2010).

360. Congressman Peter DeFazio (OR-04) introduced a 2021 amendment to the War Powers Resolution, advocating, among other things, the inclusion of civilian contractors. H.R.J. Res. 29, 117th Cong. (2021–2022).

361. For example, the Consultation Provision would be revised to read:

The President in every possible instance shall consult with Congress before introducing United States Armed Forces *or Private Security Contractors* into hostilities or into situation where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until *both the* United States Armed Forces *and Private Security Contractors* are no longer engaged in hostilities or have been removed from such situations.

362. 50 U.S.C. § 1542.

those private soldiers. If Congress opposed the President's conduct, Congress would have the authority to compel the removal of PSCs under the Concurrent Resolution Provision. Adding PSCs—and PSCs only—to the War Powers Resolution would be a narrowly tailored solution to the problem of the two-tiered military.

The first step in implementing this solution is to define what a PSC is. In general, a PSC is a contractor that provides a service which requires them to carry a weapon in the performance of their duties.³⁶³ Delving into the details gets murky. Many official reports have inconsistent definitions of what constitutes a PSC, often requiring the disclaimer “for the purposes of this paper.”³⁶⁴ The DOD defines what a PSC is³⁶⁵ but the 2021 GAO report found that the “DOD guidance lacks adequate specificity as to whether certain activities are included in or excluded from the definition.”³⁶⁶ The DOD's definition fails to accurately capture actions that should be classified as PSC work.³⁶⁷ For example, the DOD relies on job titles to determine if a contractor is a PSC.³⁶⁸ These titles included “Security Management Specialists,” “Intelligence Analysts,” and “Transportation Security Screeners.”³⁶⁹ The GAO found job titles to be an imprecise metric of what constitutes a PSC, because job titles varied by post and were not descriptive of the work that the PSC would actually do.³⁷⁰ Thus, the GAO determined that relying on the DOD definition

363. The National Defense Authorization Act for Fiscal Year 2008 defines private security functions as “activities engaged in by a contractor” who performs an activity which requires the contractor “to carry weapons in the performance of their duties.” National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, §§ 841–848, 122 Stat. 230, 230–45 (2008).

364. See SCHWARTZ, *supra* note 39, at 2 (“For the purposes of this report, the services provided by private security contractors can be divided into two major categories . . .”); GOV'T ACCOUNTABILITY OFF., *supra* note 113, at 4 (“[F]or the purpose of this report, we use ‘PSC company’ when referring to the company, ‘PSC personnel’ when referring to the individual personnel, and ‘PSC contracts’ when referring to contracts for companies to provide private security functions.”).

365. 32 C.F.R. § 159.3 (2023).

366. GOV'T ACCOUNTABILITY OFF., *supra* note 113, at 8.

367. *Id.* at 13.

368. *Id.* at 11.

369. *Id.*

370. *Id.* at 13.

alone “is not a reliable approach for comprehensively identifying PSC contracts and personnel.”³⁷¹

The GAO’s recommendation, which this Note adopts, is to define PSCs by the laundry list of services they provide.³⁷² Laying out a “more definitive list of activities and services that fall within DOD’s definition of private security functions . . . would better allow DOD” to accurately determine whether a contractor is a PSC.³⁷³ While the GAO did not specify a list of duties, agency stakeholders could create one based on what the DOD, State Department, and other executive agencies already require of PSCs. This list could include tasks that require carrying a weapon in the general performance of duties, guarding government facilities, providing security for convoys, and more. While no list will be perfect, this approach would at least capture many of the tasks that PSCs perform.³⁷⁴ In addition, by defining what a PSC is in such an important statute, this approach may achieve the benefit of creating uniformity across agencies, a problem that has been plaguing academics and policy-makers.³⁷⁵

This proposal would give “Congress the regulatory and war-making authority over privateers that is commensurate with what it enjoys over the U.S. Armed Forces.”³⁷⁶ Achieving parity between U.S. Armed Forces and PSCs will close the current loophole in the War Powers Resolution. No longer will the President have the ability to deploy private armies without congressional input. The more that Congress knows about the President’s action, the better able it is to respond to any problems that arise.³⁷⁷ The Consultation Provision and the Reporting Requirement will shed more light on the President’s action, allowing Congress to protest the President’s actions, cut off funding, or even invoke the power of the Concurrent Resolution Provision, forcing the President to withdraw troops. Even merely threatening to invoke the War Powers Resolution

371. *Id.* at 12.

372. *Id.* at 13.

373. *Id.* at 15.

374. *Id.*

375. *See supra* note 43 and accompanying text.

376. *See Michaels, supra* note 19, at 1122.

377. *See id.* at 1126 (“Closing the status gaps would indeed add to the ‘publicization’ of private contractors.”).

could still curb the President's actions because the President is fearful of Congress actually acting.³⁷⁸

When citizens are made aware of the actions of deployments they find undesirable, they can also express opposition.³⁷⁹ Public opposition can spur change, proven by the Vietnam-era protests that forced then-President Johnson to end the Vietnam War.³⁸⁰ Public participation is “a necessary and valued component of the republican system as evidenced in the Constitution, culture, and customs of the United States.”³⁸¹ Increasing transparency of the President's action can bring accountability, encouraging presidential restraint.³⁸²

The specter of presidential noncompliance looms with every addition to the War Powers Resolution.³⁸³ Yet this solution is much narrower than the first proposal, reducing the burden on the President. Despite the Executive's protests and perceived inadequacies of the War Powers Resolution, there is a “spirit of compliance” with the statute—shown by the submission of forty-eight hour reports.³⁸⁴ Cabining the expansion of the War Powers Resolution to PSCs reduces the likelihood that the President challenges the constitutionality of the statute because PSCs encompass a small part of the overall forces, so the burden on the President would be minuscule.³⁸⁵

Achieving parity within the two-tiered military would comport with “democratic governance.”³⁸⁶ The Madisonian system of checks and balances would ensure that the President does not violate the wishes of Congress or the people. Incorporating PSCs into the War Powers Resolution would be a positive first step in comporting with the values of

378. Hulme, *supra* note 329.

379. See Michaels, *supra* note 19, at 1079.

380. See Carl Brown, *A Creeping Doubt: Public Support for Vietnam in 1967*, ROPER CTR. (Aug. 16, 2017), <https://perma.cc/MS8-XLMY>.

381. Michaels, *supra* note 19, at 1079.

382. See *id.* (“Americans who are unwittingly kept ill-informed of their country's involvement in matters overseas cannot serve their necessary roles in keeping the State responsive and responsible.”).

383. GRIMMETT, *supra* note 156, at 2.

384. Weiner, *supra* note 327, at 869.

385. See COTTON ET AL., *supra* note 76, at 12.

386. Michaels, *supra* note 19, at 1122.

accountability and transparency.³⁸⁷ The greater the degree to which PSCs are incorporated into the legal structure of congressional regulation, the less likely it is that such contractors could be used in a wanton way by the Executive.³⁸⁸ This would lessen the likelihood of a conflict fought entirely by private soldiers.

3. Political Realities of Reform

Reforming the War Powers Resolution has been politically difficult.³⁸⁹ Many legislators have tried to alter the statute.³⁹⁰ None have succeeded.³⁹¹ The President, members of Congress amenable to a hawkish President, and the private military industry will likely lobby against this Note’s proposal. Without overwhelming congressional support, any proposal is unlikely to muster enough support to overcome a presidential veto.³⁹²

Yet this is not the end of the story. Passing the War Powers Resolution was arduous.³⁹³ It took years to muster enough support.³⁹⁴ Even then congressional support was not unanimous and the President adamantly opposed the statute.³⁹⁵ Nonetheless, members of Congress were steadfast in their belief that one person should not be the ultimate decisionmaker in determining whether the United States should go to war.³⁹⁶ Congress held the line and passed the War Powers Resolution over then-President Nixon’s veto.³⁹⁷ Evidence of that same motivation exists now, shown by the repeated attempts to revamp the War Powers Resolution and the recent overwhelming support passing the 2020 Concurrent

387. *Id.* at 1079.

388. *Id.*

389. *See* CONCEPTS AND PRACTICE, *supra* note 328, at 63.

390. *Id.*

391. *Id.*

392. *See* Michaels, *supra* note 19, at 1076 (“[E]xtending the War Powers Resolution to contractors . . . would be politically very difficult given the troubles Congress faced trying to pass the 1973 legislation over the President’s veto . . .”).

393. *See* *Congressional Control*, *supra* note 300, at 1223.

394. *Id.*

395. *Id.*

396. *Id.*

397. *Id.*

Resolution—despite not garnering enough support to overcome then-President Trump’s veto.³⁹⁸ Reform is possible and whatever iteration of the War Powers Resolution comes next, legislators should consider including PSCs.

Admittedly, there may be some problems even if some version of this Note’s proposal passes both houses of Congress and overcomes a presidential veto. A motivated President, instead of contracting *with* PSCs, could contract *out* their services. The State Department can contract PSCs to foreign governments.³⁹⁹ Known also as Foreign Military Financing (FMF), these programs aim to assist foreign governments in procuring U.S. defense services, which can include PSCs.⁴⁰⁰ At times these services can be useful in preventing hostilities from continuing, but they can also contribute to maintaining the power of authoritarians.⁴⁰¹ The Arms Export Control Act⁴⁰² (AECA) is intended to regulate all arms sales—including articles and services—to other countries.⁴⁰³ The statute is intended to effectively regulate one-time arm sales, such as the single shipment of an F-35s fighter jet, but it is unable to adequately regulate defense services that are contracted out for a continuous period of time.⁴⁰⁴ As a result, PSC contracts

398. See Hulme, *supra* note 329.

399. 22 U.S.C. § 2751; see also Avant & Sigelman, *supra* note 17, at 253 (describing how then-President Clinton sold the services of MPRI, a PSC, to provide advice and training to the Croatian government during the Bosnian War).

400. *Foreign Military Financing (FMF)*, DEF. SEC. COOP. AGENCY, <https://perma.cc/8BK7-37RR>.

401. See Andrew Boutton, *The Dangers of U.S. Military Assistance to Weak States*, 1 TEX. NAT’L SEC. REV. 1, 7 (2018) (“Security cooperation may well achieve immediate objectives . . . [h]owever, they must be calibrated to the context in which they are being implemented, so as not . . . exacerbate conflict dynamics, and/or cause civilian harm.”).

402. The Arms Export Control Act of 1976, Pub. L. No. 94-329, 90 Stat. 729 (1976) (codified at 22 U.S.C. § 2751).

403. *Id.*

404. See DAVID ISENBERG, INT’L PEACE RSCH. ORG., PRIVATE MILITARY CONTRACTORS AND U.S. GRAND STRATEGY 31 (2009), <https://perma.cc/TG8G-MF5R> (PDF) (“[T]he [AECA] does not provide adequate mechanisms for ongoing review of a service contract that may last for months or years. The AECA has no provision for enforcing compliance with the contract. Further, the AECA’s reporting requirements provide inadequate information for Congress to assess private military service contracts.”).

are sold “under the radar,” which harm the accountability of state security agencies and democracy writ large.⁴⁰⁵

Despite this problem, the President’s circumvention of the War Powers Resolution may not be all that catastrophic. Countries that the United States will try to contract with may be unstable, so formalizing a deal may be difficult.⁴⁰⁶ Additionally, the PSCs will not be under the control of the United States; rather, they would be beholden to the desires of the country that hired them. This undermines the United States’ ability to accomplish its objectives because the PSCs will not be under the United States’s control, generating the principal-agent problem.⁴⁰⁷ This is an issue that is beyond the scope of this Note.

This Note’s solution is not a panacea. Incorporating PSCs into the War Powers Resolution is a necessary start in holding the President accountable for his foreign policy actions. By requiring the President to consult, report, and notify Congress when deploying PSCs, Congress can exert pressure on the President to avoid their unwarranted use. It also informs citizens of the President’s actions, encouraging them to speak out against actions that are contrary to their interest. Holding PSCs to the same standards as U.S. Armed Forces would go a long way in constraining the private military industry that has embedded itself in the U.S. military.

IV. CONCLUSION

Since the American Revolution, private contractors have been vital in helping the United States accomplish its foreign policy objectives. They have helped the United States achieve great victories over adversaries such as the Nazis. They provided soldiers with food, water, and other necessary supplies. But when these contractors are hired because they

405. *Id.*

406. *See* Boutton, *supra* note 401.

407. *See id.* (arguing that recipients of U.S. assistance “have security priorities that differ substantially from those of the United States”). The principal-agent problem describes a situation where an agent acts on behalf of the principal but because the agent has their own interests, may not carry out the interests of the principal in the same parallel manner. *Principal-Agent Problem Causes, Solutions, and Examples Explained*, INVESTOPEDIA, <https://perma.cc/NU3K-CEQB> (last updated Apr. 24, 2021).

are armed, careful checks should be in place regulating their use. When they perform tasks that traditionally have been carried out by the military but are not subject to those same checks as the military, problems arise—problems for U.S. national security and for the human rights of other countries' populations. Currently, legal checks on PSCs are inadequate, inviting the President to use an unaccountable private military to achieve his foreign policy objectives. Any reform must “attack the underlying status discrepancies that distinguish contractors from U.S. troops.”⁴⁰⁸

To ensure that the President does not deploy PSCs without congressional authorization, Congress should expand the War Powers Resolution to include PSCs. Including PSCs would be a valuable step in holding the President accountable to Congress and to the people. Shared decision-making would encourage a more careful foreign policy, potentially preventing another Vietnam. Otherwise, it may be too late—only this time soldiers wearing private patches will be fighting wars with little to restrain their use.

408. Michaels, *supra* note 19, at 1121.